Jurisdictional Statement

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ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE AND DELMER MOSS
INDIVIDUALLY AND AS REPRESENTATIVES OF
SPORHASE AND MOSS,

Appellants,

VS.

STATE OF NEBRASKA EX REL.
PAUL L. DOUGLAS, ATTORNEY GENERAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, N.R.S. § 46-613.01, R.R.S. 1943, which prohibits the interstate transportation of ground water, and is conditioned upon reciprocal legislation in the recipient states, imposes an undue and unreasonable burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether, N.R.S. § 46-613.01, R.R.S. 1943, is unconstitutional and violates the due process and equal protection provisions of the United States Constitution.

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OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, appears in the appendix hereto, see Appendix A, *infra*, as is reported at 305 N.W.2d 614, 208 Neb. 703 (1981).

STATEMENT OF JURISDICTION

Joy Sporhase and Delmer Moss appeal from the final judgment of the Supreme Court of Nebraska enjoining the Appellants efforts to transport ground water from a Nebraska well into the State of Colorado.

The judgment was entered on May 8, 1981. See Appendix A. A motion for rehearing was entertained and denied on July 8, 1981. See Appendix B. Notices of appeal were duly filed by the Appellants on September 17, 1981. See Appendix C. This appeal is being docketed within ninety (90) days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY PROVISIONS

Section N.R.S. § 46-613.01 of the Nebraska Constitution provides as follows:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the ground water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

Article 1 § 8, Cl. 3 of the United States Constitution provides as follows:

> To regulate commerce with foreign nations, and among the several States, and with Indian tribes.

The 5th Amendment to the U.S. Constitution provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

public use, without just compensation.

The 14th Amendment to the U.S. Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Joy Sporhase and Delmer Moss, the Appellants, are residents of Phillips County, Colorado, and own adjacent and contiguous tracts of land in Chase County, Nebraska, and in Phillips County, Colorado.

2. An irrigation well physically located on the Nebraska tract is used for irrigating crops on both the Nebraska tract and the Colorado tract.

3. This well was registered with the Department of Water Resources of the State of Nebraska by Appellants' predecessors in title on January 18, 1971. The Nebraska Well Registration Number is G-33893.

4. The Appellants purchased the real estate involved at an auction in February of 1972 and expended approximately $43,500.00 to develop the irrigation system on the property.

5. On September 21, 1976, the Nebraska Department of Water Resources sent the Appellants a letter informing them that N.R.S. § 46-613.01 R.R.S. 1943 pro-

hibited the irrigation of lands in Colorado with water from a Nebraska Well. The Department's letter summarily determined that the Appellants were in violation of the statute and that litigation would follow if the Appellants continued to irrigate their Colorado land.

6. The Petition commencing this action was filed by the Attorney General of the State of Nebraska, on September 30, 1977, against Joy Sporhase and Delmer Moss, individually and as representatives of Sporhase and Moss, a family partnership, requesting that the District Court of Chase County, Nebraska, grant a permanent injunction restraining the Appellants from transporting ground water from the Appellants' well located in Nebraska into Colorado.

7. The Appellants answered on June 5, 1978, claiming eight (8) affirmative defenses regarding the transportation of ground water from their well in Nebraska into Colorado. The Appellants' answer contained the constitutional arguments presented before this Court.

8. A pre-trial conference was held on September 8, 1978, limiting the issues to be determined at trial to the pleadings and the evidence presented.

9. A trial was had before the District Court of Chase County, Nebraska on January 12, 1979. On September 17, 1979, District Judge Jack Hendrix filed a memorandum opinion which denied Appellants' constitutional attacks and granted the injunction requested by the State of Nebraska.

10. The Appellants filed a motion for a new trial and motion for order to stay the injunction on December 26, 1979.

11. The District Court overruled Appellants' motion for new trial and sustained Appellants' motion for order to stay the injunction on December 23, 1980.

12. The Appellants then appealed to the Supreme Court of Nebraska. In their brief to the Nebraska Supreme Court, the Appellants reiterated the claim that N.R.S. § 46-613.01 was unconstitutional.

13. On May 8, 1981, the Nebraska Supreme Court filed its opinion and in its opinion the Court considered and expressly rejected the constitutional claims made by the Appellants, thereby sustaining the Order of the District Court.

14. The Appellants filed a motion for rehearing on May 20, 1981, which was overruled by the Nebraska Supreme Court on July 8, 1981.

15. Their claims thus considered and dismissed, the Appellants now perfect this appeal to the United States Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

I. N.R.S. § 46-613.01, R.R.S. 1943 is CONTRARY TO COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

This case presents to the Court the important and substantial issue of a state statute clearly frustrating an essential aspect of American Law. The Supreme Court of Nebraska held that N.R.S. § 46-613.01, R.R.S. 1943, did not violate the commerce clause of the United States Constitution. The Court arrived at its decision because of faulty analysis in two areas of law. The Court incorrectly concluded that ground water is not an article of interstate commerce and that the application of N.R.S. § 46-613.01, R.R.S. 1943, did not impose an undue burden on interstate commerce. First of all, as a factual matter, ground water is an article of interstate commerce. The record shows that ground water in the

Ogallala Aquifer travels under the surface of the earth from Colorado to Nebraska. The water to the east is then pumped through the well, applied to the irrigated crops and percolates down into the ground. Water is part of the hydrologic cycle. The crops grown by Appellants as a result of the application of this ground water are then transported in interstate commerce.

In *Metropolitan Utilities District v. Merritt Beach Company*, 173 Neb. 783, 140 N.W.2d 627 (1966), the Court recognized the hydrologic cycle as a scientific fact. The Court also confirmed upon individuals the right to appropriate and transfer underground water by holding that the Metropolitan Utilities District could drill wells on land and then transfer the water to other land. The Court concluded that it could not find a reason for holding the diversion from a well field to be unlawful.

A Federal Court in the *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828, 385 U.S. 35 (1967) considered the question of whether water was an article of interstate commerce and if its restriction would be contrary to the commerce clause of the Constitution. The City of Altus, Oklahoma facing a water shortage, incurred large expenses in acquiring water from Texas landowners. The Texas Legislature then passed a bill which stated:

> No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside of the boundaries of this state unless the same be specifically authorized by an act of the Texas Legislature, and thereafter as provided by it.

Upon a suit by the landowners, the statute was declared to be unconstitutional as a direct and unreason-

able restraint on interstate commerce.

The State of Texas attempted to defend its statute on essentially two principals. Texas first argued that the purpose and intent of the statute was to serve and protect the water resources of the state by regulating the withdrawal of water from underground sources. Secondly, the state argued that since the statute in question operates on and regulates underground water which is not the subject of absolute ownership, it does not effect a substance which is a subject of commerce. The State of Nebraska has raised essentially the same arguments in this case, and the Appellants contend that is no reason for these arguments to be answered in different manner than in the Altus, Oklahoma, case.

The Appellants' suggestion that a natural resource is an article of interstate commerce is certainly not novel, but it is correct. Several U.S. Supreme Court cases have recognized natural resources as items of interstate commerce, thereby limiting the ability of states to regulate their interstate transportation. *Commonwealth of Pennsylvania v. State of West Virginia,* 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). Courts are now recognizing that states' interests in regulating and controlling those things they claim to own, is not absolute. States, therefore, will no longer be allowed to confine their resources and the resulting benefits to their own people whenever such confinement impedes interstate commerce. *Baldwin v. Fish & Game Commission of Montana,* 98 S. Ct. 1852, 436 U.S. 371, 56 L. Ed.2d 354 (1978). In *State of Missouri ex rel, Barnett v. Kansas Natural Gas Company,* 265 U.S. 298, 44 S. Ct. 544, 68 L. Ed. 1027 (1924), the Court held the transportation of natural gas from one state to another to be interstate commerce.

The Nebraska Supreme Court has determined that water is not an article of commerce by relying upon *Olson v. City of Wahoo,* 124 Neb. 802, 248 N.W. 304 (1933). In that case the Court determined the use of water should be controlled by the reasonable use doctrine and thereafter state laws were enacted to control the use of water. This obviously has no relevance as to whether or not water is an item of interstate commerce. The police power of states has been used to control many individual and property rights including many items of interstate commerce. It should be noted that in all states one merely has the right to use water. *Sax Water Law* (1965), Page 2. Nevertheless, this right to use is clearly a property right. *U.S. v. Willow River Power Company,* 324 U.S. 499 (1945). Therefore, it appears that water, like natural gas, may be reduced to possession. However, this right to use and possess is limited by the reasonable use doctrine. But this regulation by the state does not disqualify water from being an article of interstate commerce, since most personal and property rights are conditioned by the reasonable use doctrine. But in all cases, the restrictions have been and must continue to be reasonable. It seems that the Court has made the wrongful assumption that because water is an important resource and is controlled by the reasonable use doctrine it can no longer be an item of interstate commerce.

The Nebraska Supreme Court has also given undue weight to the *Hudson County Water Company v. McCarter,* 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), which held that a state would not run afoul of the commerce clause in limiting the transportation of water across state lines. However, very early in his opinion, Justice Holmes stated:

> "The problems of irrigation have no place here. Leaving them on one side . . ."

We argue, the *Hudson County* Case has no application to our situation since we are involved with irrigation.

Based upon these arguments the Appellants contend that ground water can be and should be deemed to be an article of interstate commerce.

The Nebraska Supreme Court was also erroneous in concluding that N.R.S. § 46-613.01, is a valid exercise of the state's police power and does not impose an unreasonable and undue burden on interstate commerce. A review of authoritative cases clearly establishes that in order for legislation to be valid under the police power, it cannot be arbitrary or discriminatory but must have a rational and substantial relation to the objects sought. *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926). Moreover, the commerce clause of the United States Constitution forbids a state from imposing unreasonable and undue burdens on interstate commerce. *Southern Pacific Company v. State of Arizona,* 325 U.S. 761 (1945). The *Southern Pacific* case required that a balancing test be used to discover if a regulation is an unreasonable burden on interstate commerce. The case requires the Courts to look at the state interest involved and to decide if there is a rational connection between the regulation and the interest to be furthered. This must then be balanced against the impact of the regulation on interstate commerce.

The Nebraska statute regulating water certainly advances legitimate state interests and falls within the bounds of the police power. Yet this statute, which forbids the interstate transportation of ground water unless the recipient state has a policy of reciprocity, imposes unreasonable burdens on interstate com-

merce and does not bear a rational or substantial relationship between the prohibition on interstate transportation and the object sought, which is protecting the Nebraska waters. The goal of preserving and regulating the water resources within the state of Nebraska, as Chief Justice Krivosha, candidly pointed out, could easily be achieved without requiring reciprocity. There is simply no rational or factual relationship between the clause requiring reciprocity and the state's objective.

John J. Jess, Deputy Director of the Department of Water Resources, in charge of well registrations and interstate transportation of ground water, testified that Appellants' well and irrigated lands are under the jurisdiction and supervision of the Upper Republican Natural Resource District. Ronald R. Milner, Manager of the Upper Republican Natural Resource District testified that the rules and regulations of the district had been established under *inter alia*, Chapter 46, Neb. RLS (1943), to protect ground water under the District's jurisdiction.

When the ground water control area was established, extensive scientific studies were performed to define the boundaries of the area. Appellants' well and its application of water to Colorado lands was included in the study and consideration was given to its impact on ground water in the area as part of the normal course of these studies. Moreover, the unrebutted testimony shows that Appellants' well is neither in violation of any statute nor does it interfere with any other protected well. No studies were performed indicating an adverse impact on Nebraska due to the interstate transportation of ground water to non-reciprocating states. In fact, all the Appellees discovered was the fact that the source of the ground water in question is

in the state of Colorado.

That the statute affects interstate commerce can hardly be doubted. In this case we have ground water, determined by scientific fact to be part of the hydrologic cycle, and as the record shows, interstate in its movements. The record also shows that the crops grown are sent in interstate commerce and are clearly items of interstate commerce. The United States Supreme Court has held that agricultural items could affect interstate commerce and are, therefore, subject to regulation. *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 75 S. Ct. 719, 99 L. Ed. 1040 (1955); *Wickard v. Filburn*, 317 U.S. 111 63 S. Ct. 82, 87 L. Ed. 122 (1942); *H.P. Hood v. Dumond*, 336 U.S. 525, 69 S. Ct. 69 S. Ct. 657, L. Ed. 865 (1949). Certainly, Courts in the agricultural heartland recognize the significance of agricultural products and the national and international markets to which they are sent. *Cape Co. v. Wiebe*, 241 N.W.2d 830, 196 Neb. 204 (1976).

In *Wickard*, the Supreme Court held that farm production which is intended for consumption on the farm is subject to regulation, since it might have a substantial economic effect upon interstate commerce. The *Wickard* case used a test first applied in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) which said that activity, either local or interstate, which by itself or in combination with other activities has a substantial economic effect upon interstate commerce is within the scope of the Commerce Clause and may not be unreasonably interferred with. The regulation of the use of water, certainly, either by itself, or in combination with other factors will have an effect upon interstate commerce. The movement of the water itself was termed by the Appellee's own expert witness as being interstate in character. Also, by denying water

to the Appellants the Nebraska statute will effectively stop the production of crops moved in interstate commerce since water is an essential and critical need in the production of the crops. As shown above, items with a close and substantial effect upon interstate commerce, such as water upon crops, are clearly within the Commerce Clause and can only be regulated in a reasonable manner.

In *H.P. Hood,* the Supreme Court stated, "Our system, fostered by the Commerce Clause, is that every farmer and every crafts person shall be encouraged to produce by the certainty of free access to every market in the nation . . ." This case, which disallowed unreasonable restrictions on agricultural productions certainly applies in this instance. Nebraska has denied the Appellants the capability to produce and thereby access to the free market.

Authority shows water to be an article of interstate commerce. The record also shows that the regulation of water has a close and substantial relationship and effect upon interstate commerce, namely the production of crops. For these reasons the Appellants argue that ground water is under the scope of the Commerce Clause, and that any restrictions upon its use must be reasonably and rationally connected to the state's objectives.

The Appellants urge this Court to accept the message in *City of Altus:* a statute prohibiting the removal of water from an underground source for use in another state constitutes an unconstitutional burden on interstate commerce. By including the unreasonable limitation requiring reciprocity, which does nothing to further the goals of Nebraska, the statute effectively prohibits the transportation of water. The record in the instant case clearly and unequivocally shows that

the State of Nebraska admitted connection between its ground water conservation objectives and statute. Furthermore, Nebraska admitted that no facts supported the inference of such a relationship. The reciprocity clause simply precludes an inquiry into the factors which would provide a basis for allowing or denying a permit, thereby causing a result which does not advance the cause of protecting Nebraska's water resources and unreasonably restricts interstate commerce.

II. N.R.S. § 46-613.01, R.R.S. 1943 IS UNCONSTITUTIONAL AND VIOLATIVE OF THE EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

The question relating to the equal protection and substantive due process implications of this case is substantial and merits the consideration of this Court. The concept of substantive due process provided in the 5th and 14th Amendments is basically a test of the reasonableness of a statute in relation to the government's power to enact such legislation. The primary purpose of this section of the Constitution is to protect the people of the United States from the arbitrary and unreasonable exercise of powers by state governments. However, during the trial the State of Nebraska's own witnesses admitted that there existed no rational connection between the clause which prohibits transporting water to non-reciprocating states and the objectives of protecting and managing Nebraska's ground water resources. This seems in conflict with no less an authority than the U.S. Supreme Court which has held that all legislative activity and exercises of the police power must be limited by notions of reasonable-

ness and the requirement of a substantial relation between the legislation and the objectives to be achieved. *Village of Euclid v. Ambler Realty Company, supra.*

The classic statement of the rule in *Lawlor v. Steel,* 152 U.S. 133 (1894) is still valid:

> To justify the state in . . . interposing its authority in behalf of the public, it must appear first, that the interests of the public require such interference; and second, the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

We are faced with that situation in this case. There appears to be no rational connection between the restriction and the public interest to be protected. The means used in this statute will not reasonably accomplish any expressed purpose, but will merely succeed in shutting off an irrigation well, thus causing the Appellants severe economic injury. The Appellants will no longer be able to produce crops, will be denied the use of an irrigation well, and will not be able to put their land to any reasonable use. This would seem to clearly operate as a taking without compensation. *Arverne Bay Construction Co. v. Thatcher,* 287 N.Y. 222, 15 N.E.2d 587 (1938).

Under the equal protection clause of the 14th Amendment and as an implicit guaranty of the due process clause of the 5th Amendment, any governmental acts which treat people in a dissimilar manner are unconstitutional. While Nebraska has tried to show that the language of the statutes creates a reasonable classification, the statute bears heavily only upon the irrigator who wants to use ground water in another state which does not have reciprocity. The statute singles out this irrigator without regard to the beneficial and

conservation effects and without determining if it would be beneficial or detrimental to the public welfare of the state. Indeed, authority provides that by hindering the food production and business interest of the Appellants, the statute creates an adverse effect upon the public health and welfare and is, therefore, unconstitutional. *U.S. Brewers Association, Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974); *Gillette Dairy Incorporated v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974); *Lincoln Dairy Company v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960). It seems clear that the effect of this statute will definitely affect the Appellants' business interests and hinder food production, thereby injuring the public welfare.

The reciprocal portion of N.R.S. § 46-613.01, R.R.S. 1943, raises another issue for the Court since it places the Appellants at the mercy of the law makers of another state by delegating the powers of the Nebraska legislature to that state. The issue was correctly summarized by Chief Justice Norman Krivosha in his dissent:

> But the statute as it currently exists provides that even though the Director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in the furtherance of the conversation and use of groundwater in this state, and that it is not otherwise detrimental to the public welfare, but is, in fact, beneficial to the public welfare, he, nevertheless, cannot issue a permit, solely on the basis that the adjoining state does not permit entities, including its own citizens, to transport water into this state.
>
> . . . It occurs to me that what this statute at-

> tempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which the citizens of this state have no control.
>
> . . . To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits reciprocity, though it may not have water which can be transferred, while denying that privilege to other citizens of the state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition at a particular moment or its need, strikes me as being a violation of Nebraska Constitution Article 3, Section 18, Article 1, Section 3 and the 5th and 14th Amendments of the United States Constitution.

The Chief Justice, unlike his esteemed colleagues, has not missed the practical effect of the reciprocal provision; by rejecting a permit application, not because of its reasonableness but due to a lack of reciprocity, the statute is, in effect, unreasonable.

The effects of reciprocal provisions were noted as early as 1880 by the Alabama Supreme Court in *Clark v. Mobile*, 67 Ala. 217. That case dealt with a license tax and the Court there said:

> "If a law should be passed entitled, "An act to authorize the legislature of Mississippi to fix the amount of license tax to be required of insurance companies, organized under the laws of that state in doing business in Alabama", the object would be obvious on first impression. Yet this is the necessary and practical effect of the statute as it now stands" . . .

The reciprocity clause is clearly discriminatory

against the Appellants. They are deprived use of the water simply because they desire to transport water across the state line into a state with no reciprocity, as opposed to simply moving water across county lines or into a state which offers reciprocity. This result occurs even though the movement of water into the state offering no reciprocity could be of more benefit to the State of Nebraska than the mere movement of water into a state with reciprocity or across county lines. To amplify the illogical result of the statute, other users of the Ogallala Aquifer would, in fact, be harmed if the Appellants' use of water to the West was replaced by an increased use of water by Nebraska farmers to the East. Thus the application of the statute and its wording unreasonably act upon the Appellants thereby causing an absolute prohibition.

The Appellants admit that it is not beyond the power of a state to enact legislation based upon contingencies. In this case there is only one real contingency, namely the existence of reciprocal legislation. This contingency cuts off the Appellants' rights without regard to the real and important considerations, such as whether or not the transportation of water for irrigation would be reasonable, not contrary to the use and conservation of water, and not otherwise detrimental to the public welfare.

Furthermore, no inquiry is required to discover if water is available in the reciprocatory state, nor is replenishment of the water supply required. The only requirement is a reciprocity clause which is, by itself, in no way related to the purposes for or objectives of the legislation.

Simply put, the Appellants contend that in order for a statute to be a valid exercise of the police power the statute itself and any contingencies contained therein

must be reasonable and advance the objectives of the legislation. This reciprocity clause meets neither of these criteria.

CONCLUSION

The Appellants urge the Court to review and reverse the decision of the Nebraska Supreme Court because N.R.S. § 46-613.01, as applied to these facts, will not conserve water, but will deny its use to Sporhase and Moss, thereby imposing an undue burden on commerce and denying them equal protection of the laws. For these reasons this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

JOY SPORHASE and
DELMER MOSS,
Defendants-Appellants.

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Appendix

APPENDIX A

In the Supreme Court of Nebraska

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, *Appellee,*	)	CIVIL ACTION NO. 43206
VS.	)	
JOY SPORHASE ET AL., *Appellants.*	)	

SUPREME COURT OPINION

208 Neb. 703

Filed May 8, 1981. No. 43206.

1. **Constitutional Law.** In order for the commerce clause of the U.S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce.
2. **Waters.** Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.
3. **Constitutional Law: Waters.** The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want.
4. **Legislature: Waters.** Since the Nebraska common law of ground water permits use of the water

only on the overlying land, legislative action is necessary to allow for transfers off the overlying land.

5. **Legislative Power: Waters.** The Legislature has the power to determine public policy with regard to ground water.
6. **Legislature: Waters.** Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.
7. **Waters.** Free transfer and exchange of ground water in a market setting have never been permitted in this state.
8. _____. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.
9. _____. Nebraska ground water is not an article of commerce.
10. _____. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution.
11. **Constitutional Law: Statutes: Waters.** Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978).
12. **Waters: Constitutional Law.** Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law.

13. **Legislative Delegation.** The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend.

14. **Waters.** The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of several conditions which must be satisfied before a permit to transfer ground water out of state may issue.

15. **Waters.** Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's under ground water supply, and it operates equally on all members of the affected class.

Appeal from the District Court for Chase County: Jack H. Hendrix, Judge. Affirmed.

Peter E. Schoon, Jr. and George M. Zeilinger of Padley & Dudden, P.C., for appellants.

Steven C. Smith, Special Assistant Attorney General, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

Heard before Krivosha, C.J., Boslaugh, McCown, Clinton, Brodkey, White, and Hastings, JJ.

White, J.

Appellants own adjacent tracts of land in Chase County, Nebraska, and in Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for the purpose of irrigating crops on both the Nebraska tract and the Colorado tract. Defendants' predecessor in title registered the well with

the State of Nebraska on January 18, 1971, as required by Neb. Rev. Stat. § 46-602 (Reissue 1978). However, neither the defendants nor their predecessor in title applied to the Nebraska Department of Water Resources for a permit to transport ground water from the Nebraska well across the border into Colorado as required by Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The State of Nebraska brought this action in the District Court of Chase County to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. After trial on the merits, the District Court issued the injunction, holding that § 46-613.01 does not violate the commerce clause of U.S. Const. art. I, § 8, since under Nebraska law water is not an article of commerce. The District Court also held that even if ground water is an article of commerce, the statute does not impose an unreasonable burden of interstate commerce. We affirm.

We start our analysis with the assumption that if the commerce clause is to apply to a state statute regulating the interstate transfer of a commodity, that commodity must be an "article of commerce." The term "commerce" implies that the commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value. An analysis of Nebraska case law and statutes demonstrates that Nebraska law has never considered ground water to be a market item freely transferable for value among private parties, and therefore not an article of commerce.

The first Nebraska case to consider the overlying landowner's proprietary interest in water under his land is *Olson v. City of Wahoo,* 124 Neb. 802, 248 N.W. 304 (1933). The *Olson* court specifically rejected the "English rule" of rights in ground water, which recog-

nizes absolute ownership of ground water in the overlying landowner. Instead, the court adopted a slightly modified version of the more restrictive American rule of "reasonable use"; "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Id.* at 811, 248 N.W. at 308. The "pure" American rule, as stated by other authorities at the time, did not include the concept of sharing in times of shortage, and the *Olson* court's inclusion of that concept demonstrates its view that water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it.

The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. Neb. Const. art. XV, § 4. The decades of the 1930's and 1940's saw a quantum expansion in Nebraska of the use of ground water for irrigation. See Aiken, *Nebraska Ground Water Law and Administration,* 59 Neb. L. Rev. 917 (1980). Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957 when the Legislature declared "that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state." Neb. Rev. Stat. § 46-601 (Reissue 1978), and enacted statutes

requiring well registration, well-spacing, and filling of abandoned wells. Neb. Rev. Stat. §§ 46-602 and 46-609 (Reissue 1978).

Transfer of ground water was considered by the Legislature in 1963. Neb. Rev. Stat. §§ 46-638 through 46-650 (Reissue 1978), enacted that year, and § 46-654, enacted in 1965, granted only to cities, villages, and municipal corporations the right to transport ground water out of its basin of origin for the purpose of supplying urban water needs. Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 799-800, 140 N.W.2d 626, 636 (1966), confirmed that "[u]nderground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. . . . [I]t is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained." That court held that it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use." *Id.* at 801, 140 N.W.2d at 637. The opinion clearly held that the Legislature has the power to determine public policy with regard to ground water and that it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Only a year after the decision in the *Metropolitan* case, the Legislature enacted the statute at issue in this case, § 46-613.01, dealing with transfer of Nebraska

ground water across state lines. The statute allows such transfers conditioned on the receipt of a permit from the director of the Department of Water Resources, who may grant the permit if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the receiving state "grants reciprocal rights" providing for transfer of ground water from that state into Nebraska.

The parties concede that Colorado forbids the transfer of ground water outside its borders and has no reciprocity provision in its statute. Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the *Olson* opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. Even where it appears that water itself is being marketed, as in municipal water supply arrangements, it is the value of the cost of distributing the water that is the basis of the rate structure and not the value of the water itself. See *K. S. B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977).

Appellants in their brief place great reliance on the case of *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam* 385 U.S. 35, 87 S. Ct. 240, 17 L. Ed. 2d 34 (1966), which held that a Texas statute forbidding interstate transfers of water without

legislative permission placed an unconstitutional burden on interstate commerce. However, at the time of *Altus*, Texas law treated ground water much differently than Nebraska. Texas recognized the absolute ownership of subterranean water in the overlying landowner. This is in sharp contrast to the narrowly circumscribed right of reasonable use only on the overlying land recognized in Nebraska. In addition, the *Altus* court noted that, in Texas, "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land outside the basin where produced, just as he could sell any other species of property." *Id.* at 840. In sum, said the *Altus* court, "the general law of the State of Texas . . . recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce . . . ." *Id.* at 840. Since the only transfers prohibited by Texas law were interstate transfers, *Altus* found that Texas considered ground water to be an article of commerce, subject to the commands of the commerce clause of the U.S. Constitution. However, intrastate transfers of ground water in Nebraska are permitted only under carefully prescribed conditions and do not resemble a free-market setting. Ground water use is not an unlimited private property right in Nebraska law. The decision in *Altus* is not controlling. Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

Since the *Altus* case was affirmed without opinion by the U.S. Supreme Court, we must assume that the high court had no quarrel with the District Court's application of the law to the particular facts of *Altus*. However, we need not and do not assume, as appellants would have us do, that *Altus* "overruled *sub silentio*"

the 70-year-old holding in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), that a state may, under its police power, forbid or condition the interstate transfer of its water resources without running afoul of the commerce clause. The *Hudson* case upheld the constitutionality of a New Jersey statute prohibiting the transfer of New Jersey surface water out of the state. The court noted that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States," and emphasized that the state as "quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 355-57.

There have been other U.S. Supreme Court cases limiting the rights of individual states to put conditions on the interstate transfer of natural resources other than water, such as natural gas and minnows. *Penna v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Oklahoma v. Kansas Nat. Gas. Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). However, we note that the natural resources dealt with in those cases have historically been market items, reducible to private possession and freely exchangeable for value. This has never been the case with underground water in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential

resources to the transfer of water must be done, if at all, with extreme caution. It is this caution which prevents us from holding that Nebraska ground water is an article of commerce. Because the ground water in this case is not an article of commerce, the commerce clause considerations do not apply to the Nebraska statute at issue here.

Appellants also urge that § 46-613.01 violates the due process provisions of the fifth and fourteenth amendments to the Constitution of the United States, which prohibit the United States or an individual state from depriving an individual of life, liberty, or property without due process of law. Although the arguments in the "due process" section of appellants' brief are actually equal protection arguments, we note that conditioning a landowner's right to transfer ground water either within or without Nebraska does not deprive him of a property right, since, under Nebraska common law, ground water may not be transferred off the overlying Nebraska land at all unless the public, owners of the water, grant that right. Not being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property by § 46-613.01.

Nor does the reciprocity provision of § 46-613.01 violate constitutional guarantees of due process, as appellants claim, by delegating legislative authority to the legislature of another state. The Nebraska Legislature has exercised its legislative authority by determining the public policy of the state with regard to ground water and enacting that determination into law. It has not delegated to any other state's legislature the right to determine Nebraska public policy. The reciprocity provision is merely one of several conditions to

be satisfied before a permit to transport water out of state may be granted. As stated in *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940): "The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

In *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976), the statute at issue set a 55-mile-per-hour speed limit on the portion of Interstate 80 crossing Nebraska, but declared that when the President terminates the Emergency Highway Energy Conservation Act such speed limit will revert to 75 miles per hour. The *Padley* court held that: "In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency." *Id.* at 360, 237 N.W.2d at 885. That court also stated that the rule set out in *Lennox* "is a well-recognized rule of law." *Id.* at 360, 237 N.W.2d at 885. The granting of a permit to transport water for irrigation out of state is contingent upon, among other things, the receiving state granting its landowners the same right. Each state is free to determine its own public policy with regard to ground water transfers and to condition the right to transfer on one or more contingencies. Thus, there has been no unconstitutional delegation of legislative power by the Nebraska Legislature.

Appellants finally argue that § 46-613.01 violates the equal protection clause of the fourteenth amendment to the U.S. Constitution by virtue of an unreasonable

classification. The class upon which § 46-613.01 operates consists of those persons wishing to transport Nebraska ground water out of state for irrigation purposes. It is plain from the language of the statute that the classification is reasonable. It is related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the class. Any person wishing to transport ground water out of state for irrigation purposes must apply for a permit to do so and the director of the Nebraska Department of Water Resources is to use the same guidelines in every instance in determining whether or not the permit may issue. That the statute does not apply to irrigators who do not wish to transport ground water out of state hardly makes it violative of equal protection.

The judgment of the District Court is affirmed.

Affirmed.

Krivosha, C.J., concurring in part, and in part dissenting.

While I generally concur with the majority's conclusion that establishing legislative criteria to control the transfer of water from the State of Nebraska to an adjoining state is not a violation of the commerce clause of the U.S. Constitution, I must respectfully dissent from that portion of the majority's opinion which holds that the statutory prohibition against the issuance of the permit, if the adjoining state does not grant reciprocity, is a constitutionally valid act of the Legislature. I believe that that portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which prohibits the Director of Water Resources from issuing a permit solely on the basis that the adjoining state does not grant reciprocity is an unreasonable classification and violates both the Con-

stitution of the United States and the Constitution of the State of Nebraska.

Were the statute in question to provide that no person, firm, city, village, municipal corporation, or any other entity, including a citizen of the State of Nebraska, could use water from this state on land owned by such entity in both this state and an adjoining state unless and until the Director of Water Resources found that the water request was reasonable, was not contrary to the conservation and use of ground water, and was not otherwise detrimental to the public welfare, I would have no difficulty with the statute. But the statute as it currently exists provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in furtherance of the conservation and use of ground water in this state, and that it is not otherwise detrimental to the public welfare, but in fact is beneficial to the public welfare, he, nevertheless, cannot issue such permit, solely on the basis that the adjoining state does not permit entities, including its own citizens, to transport water into this state.

The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state solely on the basis that the adjoining state would not reciprocate. If one were to extend this statute to its logical conclusion, one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was imminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity.

It occurs to me that what this statute attempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control.

To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits reciprocity, through it may not have water which can be transferred, while denying that privilege to other citizens of this state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition at a particular moment or its need, strikes me as being a violation of Neb. Const. art. III, § 18, and art. I, § 3, and the fifth and fourteenth amendments to the U.S. Constitution. I would have struck down that portion of § 46-613.01 which denies authority to the director if the adjoining state does not otherwise grant reciprocity.

APPENDIX B

In the Supreme Court in and for the State of Nebraska

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, *Appellee,*	)	CIVIL ACTION NO. 43206
VS.	)	
JOY SPORHASE ET AL., *Appellants.*	)	

DENIAL OF MOTION FOR REHEARING

Motion of appellant for rehearing overruled; motion to stay mandate denied.

LARRY D. DONELSON,
Clerk

APPENDIX C

In the Supreme Court in and for the State of Nebraska

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS ATTORNEY GENERAL, *Appellee,*	)	CIVIL ACTION NO. 43206
VS.	)	
JOY SPORHASE AND DELMER MOSS, INDIVIDUALLY AND AS REPRESENTATIVES OF SPORHASE AND MOSS, *Appellants.*	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Joy Sporhase and Delmer Moss, individually and as representatives of Sporhase and Moss, the Defendants in the above cause No. 43206, hereby appeal to the Supreme Court of the United States from the final judgment of the Nebraska Supreme Court entered on July 8, 1981.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Respectfully submitted,

PADLEY & DUDDEN, P.C.
BY: RICHARD A. DUDDEN
333 East Second Street
P.O. Box 60
Ogallala, Nebraska 69153
(308) 284-6061

PROOF OF SERVICE

I, Richard A. Dudden, attorney for Joy Sporhase and Delmer Moss, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of September, 1981, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, as follows:

1. Paul L. Douglas, Esquire, Attorney General, State Capitol Building, Lincoln, Nebraska 68509.

2. Jack D. Hendrix, Judge of the District Court of Chase County, Nebraska.

It is further certified that all parties required to be served have been served.

Respectfully submitted,

RICHARD A. DUDDEN
PADLEY & DUDDEN, P.C.
333 East Second Street
P.O. Box 60
Ogallala, Nebraska 69153
(308) 284-6061

Filed on September 17th, 1981 in the Supreme Court of Nebraska.

APPENDIX D

In the Supreme Court in and for the State of Nebraska

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, *Plaintiff,*	)	
VS.	)	CIVIL ACTION NO. 43206
JOY SPORHASE AND DELMER MOSS, INDIVIDUALLY AND AS REPRESENTATIVES OF SPORHASE AND MOSS, *Defendants.*	)	

CERTIFICATE BY THE CLERK OF THE SUPREME COURT

This is to certify that in the case of State ex rel. Douglas v. Sporhase, Gen. No. 43206, this Court rendered its opinion on May 8, 1981 and overruled the appellant's motion for rehearing on July 8, 1981.

LARRY D. DONELSON, Clerk

Joint Appendix

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-613

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE and DELMAR MOSS
Individually and as Representatives of
SPORHASE and MOSS,

Appellant,

vs.

STATE OF NEBRASKA, EX REL.
PAUL L. DOUGLAS, Attorney General,

Appellee.

JOINT APPENDIX

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Appeal Docketed September 24, 1981
Probable Jurisdiction Noted November 30, 1981

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No. 81-613

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE and DELMAR MOSS
Individually and as Representatives of
SPORHASE and MOSS,

Appellant,

vs.

STATE OF NEBRASKA, EX REL.
PAUL L. DOUGLAS, Attorney General,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

CHRONOLIGICAL LIST OF RELEVANT DOCKET ENTRIES

September 30, 1977—Plaintiff State of Nebraska filed petition in the District Court for Chase County, Nebraska.

June 2, 1978—Defendants' Sporhase and Moss's answer filed.

August 4, 1978—Plaintiff's amended reply filed.

January 12, 1979—Trial of action before the Court is commenced.

December 17, 1979—Opinion and judgment of District Court for Chase County, Nebraska, entered.

January 11, 1980—Order entered granting Defendants' motion for order to stay injunction.

January 11, 1980—Order entered denying Defendants' motion for a new trial.

January 25, 1980—Defendants' notice of appeal to Nebraska Supreme Court filed.

January 27, 1981—Cause of action argued and submitted to the Nebraska Supreme Court.

May 8, 1981—Opinion of Nebraska Supreme Court entered affirming judgment of the District Court.

July 8, 1981—Order entered overruling motion of Defendants for rehearing.

July 8, 1981—Order entered overruling motion of Defendants to stay mandate.

September 17, 1981—Defendants' notice of appeal to the United States Supreme Court filed.

September 24, 1981—Jurisdictional Statement of Appellants, Sporhase and Moss, filed with the United States Supreme Court.

October 22, 1981—Motion in the alternative to dismiss or to affirm and brief in support thereof filed by Appellee, State of Nebraska.

November 30, 1981—United States Supreme Court notes probable jurisdiction.

IN THE DISTRICT COURT OF
CHASE COUNTY, NEBRASKA

Doc. 0 Page 21

Case No. 4096

STATE OF NEBRASKA, EX REL.
PAUL L. DOUGLAS, Attorney General,

Plaintiff,

vs.

JOY SPORHASE and DELMER MOSS, Individually and as Representatives of Sporhase & Moss,

Defendants.

PETITION

(Filed September 30, 1977)

COMES NOW the plaintiff and for this cause of action against the defendants states:

1. That the plaintiff is the duly elected, qualified and acting Attorney General of the State of Nebraska.

2. That the plaintiff's authority to bring this action is derived from the statutory law of the State of Nebraska, specifically, section 84-205, R. R. S. 1943.

3. That the defendants are residents of Phillips County, Colorado, and their mailing address is Sporhase & Moss, Route 1, Box 88, Holyoke, Colorado 80734.

4. That the defendants own and operate an irrigation well located in the NE ¼ section 26, Township 7 North, Range 42 West, of Chase County, Nebraska.

5. That said well was registered with the State of Nebraska on January 18, 1971, pursuant to section 46-602, R. S. Supp., 1976, and the registration number is G-33893.

6. That groundwater from the defendants' well located in Nebraska has been transported by the defendants

across the state line into Colorado for the purpose of irrigating lands located in Colorado.

7. That section 46-613.01, R. R. S. 1943, requires that any person, firm or entity who intends to transport groundwater from any well located in Nebraska to an adjoining state, must first apply to the Department of Water Resources of the State of Nebraska for a permit to transport the water to the adjoining state.

8. That the defendants have not obtained a permit to transport groundwater from Nebraska into Colorado as required by section 46-613.01, R. R. S. 1943.

9. That the defendants have refused the requests of the plaintiff and the Department of Water Resources of the State of Nebraska to cease pumping water from said well to the lands in Colorado.

WHEREFORE, plaintiff prays for judgment as follows:

That this court permanently and perpetually enjoin the defendants from transporting groundwater pumped from the well located in Nebraska into Colorado, until the required permit has been obtained or authorization is granted by law, and that this court tax all costs of these proceedings against the defendants.

STATE OF NEBRASKA, EX REL.
PAUL L. DOUGLAS, Attorney General,
Plaintiff,
By PAUL L. DOUGLAS, Attorney General
By /s/ Steven C. Smith
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Telephone (402) 471-2682
Attorneys for Plaintiff.

ANSWER

(Filed June 5, 1978)

COME NOW the Defendants, by and through their attorneys, PADLEY & DUDDEN, P. C., and for Answer to the Plaintiff's Petition state as follows:

1. Admit Paragraphs No. 3, 4, 5, 6, 7, and 9 of Plaintiff's Petition.

2. Specifically deny Paragraphs 2 and 8 of the Plaintiff's Petition and denies Paragraph 1 of the Plaintiff's Petition for the reason that Defendants are without sufficient knowledge to affirm the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

1. The Defendants incorporate herein by reference as though fully set forth the allegations contained in the Answer hereinabove.

2. That the registration of the instant well bearing No. G-33893 was granted by the State of Nebraska with full knowledge that the Defendants intended to transport water across the state line into Colorado, a copy of Registration # G-33893 being attached hereto, marked Exhibit A, and incorporated herein by reference as though fully set forth.

3. That the Defendants incurred substantial sums and expenses in improving the land reflected in Exhibit A in reliance upon the well registration and that these improvements were reasonably forseeable to the Plaintiff.

4. That for all intents and purposes said registration constitutes the permit required under Section 46-613.01, R. R. S. 1943.

SECOND AFFIRMATIVE DEFENSE

1. The Defendants incorporate herein by reference as though fully set forth the above and foregoing allegations of their Answer and First Affirmative Defense.

2. That the Plaintiff is estopped from pursuing any injunctive remedy against the Defendants.

THIRD AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That the Plaintiff has waived any right to pursue remedies under the Nebraska Ground Water Management Act by reason of laches.

FOURTH AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That Section 46-613.01, R. R. S. 1943, is unconstitutional and denies the Defendants equal rights under the law as provided by Section 1, Article I, of the Nebraska Constitution, and Section 1 of the 14th Amendment to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That Section 46-613.01, R. R. S. 1943, is unconstitutional as promulgated by depriving the Defendants their right to travel as guaranteed by the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That Section 46-613.01, R. R. S. 1943, as promulgated, and if applied against the Defendants in the instant matter will unreasonably burden interstate commerce, contrary to Clause 3, Section 8, of Article I of the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That Section 46-613.01, R. R. S. 1943, as promulgated, and if applied against the Defendants in the instant matter, bears no reasonable relation to any public purpose and deprives the Defendants of their rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3, of the Nebraska Constitution.

EIGHTH AFFIRMATIVE DEFENSE

1. That the Defendants incorporate herein by reference as though fully set forth the allegations of the above and foregoing Answer and Affirmative Defenses.

2. That the Plaintiff failed to adequately inform the Defendants of their requirements under Section 46-613.01, R. R. S. 1943, and thereby prevented the Defendants from obtaining a well in Colorado, which they otherwise could have obtained in 1971.

WHEREFORE, for each of the above and foregoing reasons, the Defendants pray that this Court dismiss the action of the Plaintiffs with prejudice and tax all costs of this proceeding including attorney's fees and expert witness fees to the Plaintiff.

JOY SPORHASE and DELMER MOSS,
Individually and as Representatives of
Sporhase and Moss, Defendants.

By: /s/ Peter E. Schoon, Jr.
PADLEY & DUDDEN, P. C.

237 South Campbell
Holyoke, Colorado 80734
(303) 854-2922

Exhibit

Exhibit A

Registration No. G-33893 County of Chase

Date Filed January 18, 1971

STATE OF NEBRASKA
IRRIGATION WELL REGISTRATION

I, Colorado-Nebraska Farms Inc. of Holyoke, Colorado, County of Phillips, State of Colorado, being first duly sworn upon my oath say:

1st. That the name of the owner of the land upon which the irrigation well is located is ....., of Same Street, ... County of ..... State of .....

2nd. That the irrigation well is located on the NW Quarter of the NE Quarter of Section 26, Township 7, Range 42 of the Sixth P. M., Chase County, and is 30 feet from the North line and 35 feet from the West line of said tract.

3rd. That the well was installed with the intention of irrigating all or parts of the following described land: Pt of E½ of E½ of Sec. 26-7-42 Chase County & NE¼ of Sec. 29-7-42 Phillips County, Colo., amounting in all to approximately 160 acres.

(If installation consists of a battery of wells with one outlet, give details on a sheet to be attached hereto.)

4th. That the capacity of said well under normal operating conditions is 1200 gallons per minute.

5th. That the depth of the well is 235 feet, measured from the surface of the ground.

6th. That the inside diameter of the casing is 16 inches.

7th. That the static water level in the well is 52 feet below ground surface.

8th. That the depth to water under normal pumping conditions is 67 feet below ground surface.

9th. That the diameter of the pump column is 8⅝ inches. That the diameter of the 5 bowl or bowls is 12 inches.

10th. That the type and size of impeller is as follows: Open

11th. That the well was completed on or about the 15 day of July, 1970.

12th. That attached hereto are three copies of the log of the well certified to by the driller of the well.

13th. That the driller of this well is Stewart Drilling Co., whose address is Rout 3, Sterling Colo. 80751.

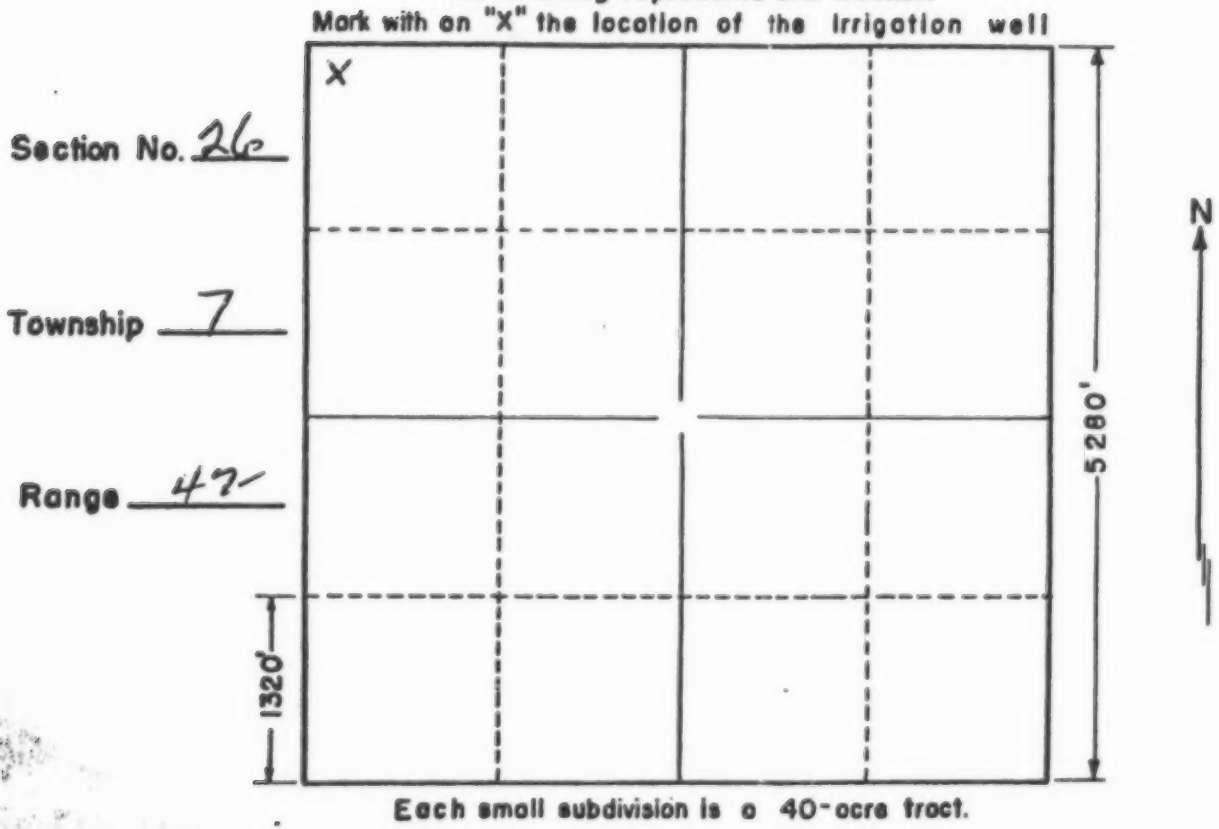
14th. That the name of the tenant or operator, if other than the owner, is....., whose address is .....

15th. That the relation which the subscriber to this instrument bears to said registrant is that of stockholder and that he is authorized to sign this instrument in behalf of the interest affected.

Signed: /s/ Edwin Axe
Dated: 1-15-'71

This drawing represents one Section

Mark with an "X" the location of the irrigation well



Each small subdivision is a 40-acre tract.

State of Nebraska)
) ss.
Department of Water Resources)

This instrument was filed for record at 1:15 o'clock P. M., on the 18th day of Jan. 1971.

/s/ Dan S. Jones, Jr.
Director of Water Resources

Registration No. G-33893 County of Chase

Date Filed Jan. 18, 1971

STATE OF NEBRASKA
CERTIFICATE OF WELL DRILLER

I, Stewart Drilling Co. of Rout 3, Sterling, Colo. County of Logan, State of Colo., do hereby certify that:

1. I am the driller of an irrigation well located on the North Quarter, Section No. 26, Township 7 North, Range 42, owned by Colorado-Nebraska Farms, Inc., whose postoffice address is Holyoke, State of Colorado.

2. That the drilling was begun on the 1 day of July, 1970, and completed on the 15 day of July, 1970.

3. That the well is cased and screened in the following manner: 155 ft. 16″ Plaine, 80 ft. 16″ Perfated.

4. That the diameter of drilled hole is 26 inches.

5. That Rotary type of drilling machinery was used.

6. That the drilled hole is/is not sealed, as follows: Gravel Packed.

7. That the following is an accurate log of the depth, thickness and character of the different strata penetrated, and the location of water-bearing strata:

DEPTH IN FEET

FROM	TO	MATERIAL DRILLED
0	4	Top Soil
4	20	Mog. Clay, & Sand
20	55	Clay, Sand, Sandstone, & Gravel Str.
55	114	Sandstone, Limestone, Sand, Clay, & Gravel Str.
114	180	Clay, Sand, & Gravel Str.
180	200	Sand, Gravel, Limestone, & Some Clay Str.
200	232	Sand, & Gravel
232	235	Clay

AMENDED REPLY

(Filed August 3rd, 1978)

COMES NOW the plaintiff and for reply to the defendants' Answer denies and alleges as follows:

1.

The plaintiff alleges that the first, second, third and eighth affirmative defenses in the defendants' Answer do not state facts sufficient to raise a defense against the plaintiff.

2.

The plaintiff denies all allegations contained in each and every affirmative defense contained in the defendants' Answer.

WHEREFORE, plaintiff prays that this court grant the prayer of its Petition.

STATE OF NEBRASKA, EX REL. PAUL L. DOUGLAS, Attorney General, Plaintiff,

By PAUL L. DOUGLAS
Attorney General

By /s/ Steven C. Smith
Special Assistant Attorney General

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke

21 East 19th Street
P. O. Box 1204
Scottsbluff, Nebraska 69361
Telephone: 635-3161

MEMORANDUM OPINION

(Filed December 17, 1979)

The following opinion is issued by the Court in order that the parties and the attorneys might understand some of the reasons for the decision of the Court.

I.

INJUNCTION

The issues here are properly presented by the Attorney General of the State of Nebraska, the Attorney General being a proper party to bring the action on behalf of the State of Nebraska. See State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2nd 577.

II.

EFFECT OF REGISTRATION

The position of the state is that the defendants are violating Section 46-613.01 R. S. Neb. as amended by removing ground water from Nebraska without first having obtained a permit as required by that section. One of the defenses is that a predecessor in title did, on January 18, 1971, file an irrigation well registration showing an intention to irrigate the land in Phillips County, Colorado (Exhibit No. 1). At that time Nebraska made no objection to the registration.

An examination of the statutes of Nebraska reveals that the registration of wells for other than domestic purposes is required by Section 46-602. The purpose is to make a record, not to control. The duties of the Department of Water Resources under 46-602 are ministerial. On the other hand, 46-613.01 has a separate and distinct purpose,

and requires separate and distinct acts by both the user and the State of Nebraska. The registration of the well under 46-602 cannot ripen into a permit under 46-613.01 under the facts of this case.

It should be further pointed out that neither estoppel nor laches is available to defendants against the state. (State ex rel. Meyer v. Knutson, supra, State v. Platte Valley Public Power and Irrigation District, 143 Neb. 661, 10 N. W. 2nd 631).

III.

CONSTITUTIONALITY

The constitutionality of 46-613.01 must be met in this case. The defendants are removing ground water from Nebraska to Colorado. The section requires the defendants to obtain a permit to do so. The defendants have obtained no permit. Injunction will lie unless the provisions of the statute are contrary to constitutional provision.

IV.

POSITIONS OF PARTIES

The defendants base their principal contention of unconstitutionality on the United States Constitution, Art. I, Sec. 8 (commerce clause), and upon the interpretation of the provision as given in Altus v. Carr, 255 F. Supp. 828 (Tex. 1966) affirmed per curiam, 385 U. S. 35 (1966). In this case the plaintiff, an Oklahoma city, entered into a contract with a Texas resident to purchase his ground water for use in Oklahoma. Thereafter, Texas passed a statute reading as follows:

> "No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

The court struck down the statute as being in violation of the commerce clause.

The plaintiff, on the other hand, points out differences in the law and facts presented in the instant case, as compared to the law and facts presented in the Altus case. Plaintiffs further point out the case of Hudson County Water Co. v. McCarter, 209 U. S. 349 (1908). In that case an injunction was sought by the State of New Jersey which prevented the water company from withdrawing three million gallons of water a day from the Passaic River and delivering it to the City of New York under a New Jersey statute reading as follows:

> "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into another State, for use therein."

The Supreme Court of the United States upheld the injunction and the statute. It specifically found that the statute was not in violation of the commerce clause. The opinion was written by Mr. Justice Holmes.

V.

ALTUS AND McCARTER

Regardless of the veneration with which Mr. Justice Holmes is held, it appears that the Altus decision is good law. The Altus case is relatively recent and in conformity

with the modern concept in applying the commerce clause. Whether or not the Altus opinion has overruled McCarter sub silentio presents an interesting question, but perhaps this determination is not necessary for our purposes.

VI.

STATUTE

Prior to 1969, the Nebraska law, 46-613.01, was quite similar to the laws in Altus and McCarter. It provided for application for a permit from the Department of Water Resources, but the department could not grant a permit unless (1) authorized by the legislature, and (2) reciprocal rights were granted by the other state.

In 1969, 46-613.01 was amended to eliminate involvement of the legislature. Now the Department of Water Resources is to grant a permit if it finds (1) the withdrawal of the ground water is reasonable, (2) the withdrawal is not contrary to the conservation and use of ground water, (3) the withdrawal is not otherwise detrimental to the public welfare, and (4) reciprocal rights are granted by the other state involved.

The statute, therefore, presents differences from the statutes involved in Altus and McCarter.

VII.

PARTICULAR LAWS AND FACTS

The facts and laws of Nebraska differ from those involved in Altus and McCarter. In our situation the water is being withdrawn for irrigation purposes. Nebraska applies a combination of the American Rule and the Cali-

fornia Correlative Rights Rule as to ownership and use of ground water. Texas, at least, applied the English or absolute ownership rule. Nebraska has established a plan for conservation and use of ground water. The plan has been implemented in the Upper Republican Natural Resources District within which the well involved is located. A certain apportionment is being established which will limit Nebraska users. Nebraska has enacted a number of other laws designed to comprehensively regulate the conservation and use of ground water. Case law has refined the application of the statutes. Transbasin diversion is prohibited, and priorities are set up for domestic, irrigation and industrial use. The plaintiff claims that if a permit is not required of out-of-state users, that the comprehensive plan will be threatened.

It should be noted that in the instant case the defendants have not been denied a permit, although there is language in a letter to the defendants from the state deputy director of water resources which states that Nebraska law prohibits the activity carried on by the defendants (Exhibit 6). The contest is basically whether the defendants may be required to obtain a permit under the law. It must be presumed that the state of Nebraska will administer the law with fairness and impartiality. If it does not, and the law is valid, the remedy would be to litigate the denial of the permit. This case does not present that problem.

VIII.

WATER AS AN "ARTICLE OF COMMERCE"

That water is unique is not open to question. Unlike any other resource, it is never consumed. It is re-cycled,

but not used up. Further, there can be no growth without it. However, just because it is unique does not mean that it cannot be an article of commerce. Like any other substance, it can at times be an article of commerce and at times not be an article of commerce. Therefore, the decision in this case must be based upon the particular facts presented here. Altus relies heavily upon Commonwealth of Pennsylvania v. State of West Virginia, 262 U. S. 553, 43 A. Ct., 658 (1923) and West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1910). These were natural gas cases, but Altus is proof that water can also be an article of commerce.

IX.

WATER INVOLVED HERE AS AN "ARTICLE OF COMMERCE"

In the Altus, Pennsylvania and West cases, the courts carefully bring out the fact that generally if the item involved was an article of intrastate commerce, it becomes an item of interstate commerce when sufficiently involved with movement across state lines. As gas was subject to individual ownership in the Pennsylvania and West cases, so water was subject to individual ownership in the Altus case. Under the law of Texas, a landowner had the right to appropriate all water under the land and sell it to others for use off the land. In Nebraska, however, the owner of land only has the right of reasonable appropriation for use on the land he owns, and then if the water is insufficient for all, each is entitled to a reasonable proportion of the whole. The water which is being piped to Phillips County, Colorado, in this instance, could not be bought and sold. It is not, in this particular instance, an article of

commerce under the provisions of the United States Constitution.

X.

UNREASONABLE BURDEN

In the event the water in this case should be an article of interstate commerce, the statute would still not create an unreasonable burden. In the Altus case the Court said:

> ". . . Moreover, on the facts of this case is appear(s) to us that Section 2 of Article 7477b does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. . . ."

The Nebraska statute does not prohibit, it requires a permit. Nebraska has the Water Management Act, together with other laws and court decisions creating a conservation and use plan. The unrestricted removal of water from the state of Nebraska could destroy the plan. The federal government has not entered this field, but has left it to the states. Hughes v. Oklahoma (77-1439, 39 CCH S. Ct. Bull. p. B2210 quotes with approval the following from Pike v. Bruce Church, 397 U. A. 137 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest in-

volved, and on whether it could be promoted as well with a lesser impact on interstate activities."

In the case at bar, there is a legitimate local purpose without any realistic alternative means for a solution. By requiring a permit, the effects should be slight regarding interstate commerce. If the state of Nebraska properly administers the law, it should result in evenhanded use and control of the underground water resources.

XI.

EQUAL PROTECTION AND DUE PROCESS

It appears that the commerce clause is the most serious constitutional problem, but equal protection and due process are raised. The statute in question operates on all equally, and the classification is proper. The question is the restriction upon removal of water from the state of Nebraska, but the restriction applies to all.

As to the reciprocity clause, the more approved view is that such conditions are reasonable and do not amount to the state of Nebraska delegating legislative powers to the state of Colorado (16 Am. Jur. 2nd Constitutional Law Sec. 247).

XII.

CONCLUSION

An injunction should be and will be granted in the order of the court with costs to the defendants.

BY THE COURT:

/s/ Jack H. Hendrix
District Judge

JOURNAL ENTRY

(Filed January 11, 1980)

On the 17th day of December, 1979, this matter came on for the Court's consideration upon the merits of the case, this case having been tried on January 12, 1979, briefed by the parties and submitted to the Court, the parties, through their attorneys, having agreed that the Court could render its decision in this matter outside of the presence of the parties.

The Court, after considering the evidence and the files in this case and the briefs and arguments of counsel, finds, in accordance with the Memorandum Opinion filed herein, that the Defendants should be and hereby are permanently and perpetually enjoined from withdrawing ground water from the Defendants' well located in the State of Nebraska and transporting that ground water for use in another state, namely Colorado, unless and until a permit as required by Section 46-613.01 R. R. S. 1943 is obtained from the State of Nebraska Department of Water Resources. The Court further finds that all costs of these proceedings are taxed to the Defendants.

IT IS SO ORDERED.

BY THE COURT:

/s/ Jack H. Hendrix
District Judge

VOLUME I — BILL OF EXCEPTIONS

(Filed July 28, 1980)

(Page 10)

JOHN M. JESS

Being first duly sworn, to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Jess, would you state your full name for the court?

A. John Michael Jess.

Q. And I understand you are currently employed by the State of Nebraska. Is that correct?

A. That's right.

(Page 11) Q. And what is your position there?

A. I am the deputy director of the Department of Water Resources, and also the state hydrologist for the State of Nebraska.

Q. How long have you been in that capacity with the State of Nebraska?

A. Since October, 1975.

Q. Okay. Now, what type of education background do you have after high school?

A. I have a bachelor of science degree in civil engineering, and a master of science degree in civil engineering at the University of Nebraska.

Q. Are these degrees for such training required for the position of state hydrologist?

A. I believe so, although there are no set requirements.

Q. Okay. Now, can you generally outline for the court your duties in the Department of Motor Vehicle in those two capacities?

A. Within the Department of Water Resources—

Q. Excuse me.

A. —my duties are primarily advistory in nature insofar as policy matters and in particular I am personally responsible for all well registration and well permitting done by the state.

Q. Do you supervise any activities involving ground water?

A. Yes.

Q. Which activities are you in charge of?

(Page 12) A. The two that I referred to earlier, the well registration and the permitting of new water wells constructed in the state.

Q. Do you have any other fields pertaining to ground water with which you are, with which you supervise for the State of Nebraska?

A. Yes. One other which is not as extensive, does not require an extensive amount of time is the transporting of water from Nebraska to adjoining states.

Q. Okay. Now, I believe you first mentioned registration of wells being one of your primary duties. Can

you describe briefly for the court what the departments function is in registering ground water wells?

A. Briefly the functions are as outline by statute, which instructs the department to register wells upon receipt of sufficiently completed well registrations and driller certificate forms. Those accompanied with proper registration or filing fee. Registration amounts to an examination of the forms for their completeness, also assurance that sufficient fees have been paid to the state, carrying on the statutes require that the well registration forms be, copies be provided to the various natural resources district wherein the well is located. And also the same information is passed along to the Conservation and Survey Division at the University of Nebraska. Quarterly, four times yearly the information is passed along to those two agencies as well as the information taken from the well registration forms (Page 13) being submitted to the State Natural Resources Data bank where it is key-punched and prepared for automatic data processing.

Q. Okay, now backing up a little bit. You indicated that you checked the registration forms for completeness, and you also checked the filing fee that has been offered with the form. What are the other grounds—what are all the grounds the department has for rejecting well registrations?

A. Well registrations are rejected for several reasons. One of which being if the fees are insufficient or, if the check is no good, we refuse to register a well for those reasons. We do not register a well if the information contained on the forms provided is defective or incomplete.

Q. Do you have any other grounds for rejecting a well registration?

A. We would reject a well registration if it appeared that the same well was attempting to be registered twice, which frequently happens, or if we have reason to believe that we have a fraudulent, or form that's being prepared for a nonexisting well.

Q. Now, these well registrations, are they kept in your offices at the Department of Water Resources?

A. Yes, with the copies being sent to the two agencies I indicated.

Q. They are then under your direction, supervision and control?

A. That's right.

Q. I take it this well registration is a standard form of the (Page 14) Department of Water Resources?

A. That's right. The form has changed in appearance from year to year, but in general it's pretty much the same information.

Q. Now, have you at my request searched the records of the Department of Water Resources for well registration Form G-33893, which is the subject of this action?

A. Yes, I have.

The Court: Would you give me that number again?

Q. G-33893. I am sorry.

The Court: You don't need to be sorry. There was some noise just before it all came out. So give it to me once more.

Q. G-33893.

The Court: Okay. Thank you.

Q. Mr. Jess, I am handing you what has been marked as Exhibit No. 1. Can you identify that for the court please?

A. Exhibit 1 consists of six pages, three of which are what the department considers to be the official registration forms. The irrigation well registration form is on two pages, and the certificate of the well driller is on a single page. Also at the time the department received this well registration, a personal note was attached to it as a sheet 4, handwritten note signed by an Edwin Axe. A-X-E.

Q. Can you identify the first two pages on Exhibit No. 1?

(Page 15) A. Yes. The very first page is a letter to the individual submitting the well registration. It is a carbon copy of a letter. It enclosed a receipt to the individuals making the well registration, receipt for their fee, and it indicates on here that the well had been registered. It states the location of the well, and the day that it was registered. The second page is a sheet that we use primarily for internal purposes within the department. It is intended to show the date the well was originally registered, and any subsequent change of ownership is also noted further on down on the page. This particular one we note October 30, 1975, our records reflect the change in the ownership for this particular well.

Mr. Schoon: We will object, Your Honor. He is testifying from a document which has not been admitted.

The Court: I am of the opinion he is just identifying it; overruled. However, I think you may now ask a new question.

Q. Okay. Now, Mr. Jess, are those items which are attached to Exhibit 1, and included in Exhibit 1, are those documents which the department keeps in its files pertaining to the well registration on Well No. G-33893?

A. Yes, they are.

Q. And those are some of the records over which you have custody and control. Is that correct?

A. That's right.

(Page 16) Q. And that is the well—Well No. G-33893 is the well with which we are here concerned today?

A. Yes.

Q. Your Honor, we will offer what's been marked as Exhibit No. 1,

Mr. Schoon: Your Honor, we are fully in agreement with the three pages of the registration being admitted into the evidence, and we have no objection to that. We do raise the objection to the other three pages in Exhibit 1 on the basis, first of all they are not relevant to the questions before the court. Secondly, they do contain misleading and we believe incorrect information which should not be admitted in evidence at this point. Your Honor, in regards to the basis of our objection we are objecting to the first and second pages of the exhibit and the very last 6th page of the exhibit.

The Court: Exhibit will be received. That's No. 1.

(Exhibit No. 1 is hereby made a part of this bill of exceptions and may be found in a separate volume)

Q. (By Mr. Smith) Now, Mr. Jess, you mentioned the information contained on the well registration you received is sent to various state agencies and political subdivisions. What type of information is disseminated to those agencies?

A. When we receive the well registration we receive the (Page 17) forms in triplicate. And our duty is merely to send along the second and third copies to the two agencies I indicated. So, to specifically answer your question, we send the entire contents of the registration.

Q. Do you have knowledge of what, to what use those various agencies put that information?

A. Yes, I do.

Q. What is it?

A. Most of the information by its very nature is technical, the well location, its depth, its size, pumping capacity, and on the driller's certificate a driller's or a geological log of the cuttings as the hole is drilled into the earth. This information has been used primarily for regulation, management and research.

Q. So, would you say that the purpose of the well registration was to gather information for the state and various subdivisions?

A. Yes.

The Court: What were the agencies where the copies were sent. I would like to have you repeat that.

A. The Upper Republican Natural Resources District at Imperial, and the Conservation and Survey Division at the University of Nebraska at Lincoln.

The Court: You may continue.

Q. (By Mr. Smith) Now, are you familiar with the purpose of providing this state and these various agencies with this information?

(Page 18) A. Yes, I am.

Q. And what is that?

A. The purpose, I think, is two-fold. One, is a requirement of the statute, and the second, I think, to carry on the various programs I outlined earlier for research, regulation and management and enforcement type of provisions.

Q. You also mentioned that you have duties in your capacity under the ground water management act, I believe?

A. Yes, I do.

Q. And could you briefly outline for the court what your duties under the ground water management act are?

A. My duties as, within the department, are to carry out the state's or department's functions in the administration of that act. Specifically, those duties have related to conducting hearings at the request of the natural resources district; to consider designation of a geographical area as a ground water control area. I have been the principal individual responsible for examining any testimony that was received at such hearings, and for making my recommendations to the director of water re-

sources who is empowered then to actually designate or create a ground water control area. Following that another aspect of the ground water management act involves the issuance of permits subsequent to creation of a ground water control area for the construction of new water wells within the control area. I am responsible for the receipt of those applications and for the (Page 19) issuance of the permits.

Q. Now, you mentioned that the department creates ground water control areas. How is that procedure initiated?

A. It's initiated by request from the Board of Directors of the natural resource district.

Q. Has your department in the past received a request from the Upper Republican Natural Resources District to hold a hearing?

A. Yes.

Q. Do you recall when you received that request?

A. I believe it was in December of 1976.

Q. Now, could you outline for the court the boundaries of the Upper Republican Natural Resources District?

A. The boundaries of the entire district encompass the three counties of Chase, Perkins and Dundy. They are coincident with those county lines.

Q. Now, when you received this request from the Upper Republican Natural Resources District, what were the department's actions?

A. The department's immediate action was to make contact with the district's manager to establish and set

a time and place for a hearing. To take testimony with regard to creating a control area. Following that we held a hearing here at Imperial in March of 1977, where we took testimony from individuals from the natural resources district chairman, as I recall, and from the conservation and survey division of the State of Nebraska and the natural resources commission. Following that (Page 20) the testimony was transcribed, was reviewed by myself and made an initial recommendation to the director. Following that I met with the board of directors of the natural resources district and disclosed our preliminary findings. I also disclosed our preliminary findings with the Conservation and Survey Division and the Natural Resources Commission. And finally on October 1st, on August 1st, 1977, the director made his formal designation creating a ground water control area within the Upper Republican Natural Resources District. That control area, I might add, does not cover the entire district, but only a portion of it.

Q. Does it cover the defendants' lands in this action?

A. Yes.

• • •

(Page 23) (By Mr. Smith) Q. Okay. Mr. Jess, now, since the creation of (Page 24) the ground water control district which just offered and received an order as Exhibit 2, has the department of water resources taken any further action concerning the Upper Republican Natural Resources District and the control area?

A. Yes.

Q. What was that?

A. The department has taken several actions. Immediately upon the creation of the ground water control area it became necessary for individuals intending to construct new wells to obtain a permit from the state. And so the department since September 1 pursuant to the director's order has been receiving and granting permits for construction of new water wells. To date I think the department has issued some 280 permits. The department also on two occasions has been requested by the natural resources district board to approve rules and regulations pertaining to management of ground water within the control area having been adopted by the board itself. The director on both occasions has approved in the first case the original rules and regulations. And in the second case an amendment to those rules and regulations.

Q. Mr. Jess, handing you what has been marked as Exhibit 4. Can you can state what that is please?

A. This is an order of approval signed by the director of water resources approving the initial submittal by the district of rules and regulations for management of ground water (Page 25) within the control area.

* * *

(Page 25) (By Mr. Smith) Q. Now, you mentioned that the department took another action in approving an Upper Republican Natural Resources action in this control area. Did that particular action on the part of the Upper Republican Natural Resources District affect the lands with which we are considered here?

A. Yes, it did.

(Page 26) Q. How?

A. In its initial rules and regulations the department—the board of directors established a concept of critical townships wherein certain controls were proposed and ultimately approved. In its amendment to rules and regulations the district—let me back track. In its initial rules and regulations the district indicated that designation of critical townships was indefinite into the future, and its amended form the board has indicated that the status of a critical township is for a three-year period.

Q. I see.

A. The defendants' land lies within one of these critical townships.

Q. That were created by the original rules and regulations?

A. Yes.

Q. Of the NRD?

A. Yes.

Q. Okay. Now, you also mentioned that you have duties in your capacity pertaining to interstate transfer of ground water. Is that correct?

A. Yes, I did.

Q. Will you tell the court what your duties are in that field?

A. My duty is to be in charge of receipt of any applications made by individuals to transport ground water from our state to an adjoining state. Along with

receipt of the applications I (Page 27) make recommendations to the director as to whether a, whether they should be granted.

Q. What type of information do you require on these applications?

A. Basically three particular requirements. Could be others. Those three are either by means of a map or tabulation, the location of any wells that would be constructed to transport the ground water. Second, indication of the location that the ground water would be used; that is to say by means of again of a map or tabulation, the location of any industrial irrigation, municipal or domestic, demands. And then thirdly, we would request a statement as to the amount of water on an average daily basis that would be used by users in different state.

Q. Now, on the basis of that information that you received, what determinations do you make?

A. Well, it's our intention to make an determination as to whether the use of water in an adjoining state would be consistent with conservation; whether it would be beneficial, a beneficial use, and that it would hopefully not be injurious to Nebraska interests. One other item I neglected to state earlier, was the statute requires the state to which water is to be delivered have a reciprocal agreement, in that their ground water could flow into our state. And we would be consulting the attorney general's office for an determination in that regard.

Q. Now, do you consider at all the fact that the purposed (Page 28) transfer of ground water would originate from a control area. Would you consider that relevant?

A. Yes, we would. We would with that added condition we would without doubt consult the board of directors of the affected natural resources district for their opinion and use that in our considerations as to whether to allow a permit or not.

Q. Okay. Mr. Jess, has—you are in charge of the files and you have custody over the files of all permits and applications for transfer of ground water?

A. Yes, I do.

Q. Has the department of water resources issued a permit to the defendants or their predecessors as reflected by your records, to transport ground water from Nebraska into Colorado?

Mr. Schoon: We will object to that, Your Honor, in that calls for a legal conclusion which I think is in issue in this case.

The Court: I don't think it is a legal conclusion. I think we should establish whether or not this witness has searched his records to see if there has been such an application.

Q. Yes, Mr. Jess, let's back up a little bit. Now, you testified you are in charge and you have custody over the records pertaining to applications and permits for interstate transportation of ground water. Have you at my request made a thorough search of those?

(Page 29) A. Yes, I have.

Q. For the purpose of determining whether or not the defendants have obtained a permit or have filed an application to transport ground water?

A. That was my purpose.

Q. Has the Department of Water Resources issued a permit to the defendants or their predecessors in title?

The Court: Mr. Schoon, you will want to renew your objection.

Mr. Schoon: Same reason, Your Honor.

The Court: Overruled. You may answer.

A. The department has not.

Q. Have the defendants, do your records indicate, whether the defendants or their predecessors in title have ever applied for a permit to transfer ground water in this location?

Mr. Schoon: I object again, Your Honor, as calling for a legal conclusion.

The Court: Let's establish again whether or not he made a search for that. I can't recall his—

Q. I said application or permit, but I will ask the question again.

The Court: If you are satisfied, why I am.

Q. Mr. Jess, have you—do your records reflect whether the defendants or their predecessors in title have ever applied for a permit to transport ground water from the particular location (Page 30) here?

Mr. Schoon: Again, Your Honor, the same objection.

The Court: Overruled.

A. Okay. The records indicate the defendants have not made such an application, nor their predecessors.

• • •

(Page 42)

Cross-Examination

By Mr. Schoon: Q. Have you received any request to investigate this application for any other purpose?

A. Yes, we have.

Q. Do you remember when that was received?

A. Only an approximate time period. As I recall approximately 1975 our records indicate an inquiry was made by the manager of the Upper Republican Natural Resources District regarding whether we were aware that this well, in addition to others, (Page 43) which perhaps might exist, did transport water out of our state into Colorado.

Q. Did you follow that with an investigation?

A. Yes, I did.

Q. Do you remember when you investigated it?

A. I personally examined the well site in the summer of 1976.

Q. Did you examine any other well sites for possible violations?

A. At the same time arrangements had been made to fly in an airplane at a rather low altitude along the entire state line on the west border of Chase, Perkins and Dundy counties, which I did, examining from the air the location of the wells and where the water was being transported to.

Q. Did you find any other violations?

A. No.

Q. Do I understand that you had an on-site inspection on the ground of this particular well?

A. Yes, in addition to the airplane flight.

• • •

(Page 44)

Redirect Examination

By Mr. Smith.

Q. Just a few questions, Your Honor.

Mr. Jess, I believe in response to Mr. Schoon's questions, in response to one of Mr. Schoon's questions he asked you whether (Page 45) you made an investigation on the application referring to the defendant's well registration. Now, am I correct in stating that there was no application here?

A. That's correct. The department received only the registration.

Q. Now, when you process a registration, including the defendants' registration here, is there any determination made by the department as to whether the use is reasonable or beneficial or contrary to conservation measures?

A. No, not for a well registration.

Q. But you do make that determination on an application to transport interstate?

A. Yes, we do.

• • •

(Page 48) RONALD R. MILNER

Being first duly sworn, to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Milner, could you identify yourself for the court?

A. I am Ronald R. Milner manager of the Upper Republican Natural Resources District.

Q. And how long have you been the manager?

A. Since July 1st of 1972.

Q. And is that when the district was created?

A. That was when the Upper Republican District was formed from the three soil and water conservation districts which were in operation at that time.

Q. Ron, could you briefly tell the court generally what your duties are as manager of the Upper Republican Natural Resources District?

A. My job is just the day-to-day operations of the board of directors, decisions on conservation of our natural resources in this district.

Q. Now, do you maintain an office here in town?

A. Yes.

Q. Do you have the records of the Upper Republican Natural Resources District in your custody and control in that office?

A. Yes.

Q. Now, you were here today when Mr. Jess testified, I believe (Page 49) that he received the district's request to hold a hearing to create a control area and that the control area was created. Is that correct?

A. Yes.

Q. Now, did the district—can you tell the court what the district did after the Department of Water Resources created the control area?

A. After the control area was established, the district had sixty days in which to hold a public hearing to take testimony on the type of controls to be implemented. The district held five information meetings throughout the district to get information to inform the public of what the control area—implementing the control area was about.

Q. Did the district then eventually promulgate any rules or regulations or controls?

A. Yes.

Q. When did they do this?

Mr. Schoon: Your Honor, I would like to enter our continuing objection to this line of questioning as well as on the basis of relevancy, or on the basis that it is irrelevant, and asked that it be a continuing objection similar to what we had when Mr. Jess testified as to the local district.

The Court: All right, the objection is noted. I will again ask counsel that if additional—if he has additional objections other than the relevancy of the (Page 50) con-

trol district to make them, but we will consider that there is a continuing objection to testimony regarding the control district as being irrelevant. The objection is overruled.

(By Mr. Smith) Q. Now, Mr. Milner, I believe I asked you when the rules and regulations were promulgated?

A. The district adopted them in February of 1977.

Mr. Schoon: Your Honor, we would like to move to strike that last answer on the basis that it lacks sufficient foundation, and I think it was nonresponsive to the question.

The Court: Overruled.

Q. (By Mr. Smith) Mr. Milner, I am going to hand you what has been marked Exhibit No. 3 and Exhibit 3-B. Can you identify first Exhibit 3?

A. Yes.

Q. What is it?

A. This is the rules were adopted by the Upper Republican Natural Resources District and then approved by the Department of Water Resources.

Q. Were you present at the meeting at which they were adopted?

A. Yes.

Q. When were they adopted?

A. 7th day of February, 1978.

Q. Okay. Now, so you said earlier February—February, 1977, was that incorrect?

(Page 51) A. Yes.

Q. Your Honor, we will offer Exhibit No. 3 which has been identified by the witness.

The Court: Mr. Schoon.

Mr. Schoon: Your Honor, our objection to Exhibit 3 is that it lacks relevance.

The Court: Overruled. Three is received.

(Exhibit No. 3 is hereby made a part of this bill of exceptions and may be found under separate cover)

Q. (By Mr. Smith) Now, Mr. Milner, you also have in front of you Exhibit 3-B, can you identify that please?

A. This is a definition of terms and specifications—the district specifications of flow meters, installations.

Q. Did the district also adopt that as an appendix to the rules?

A. Yes.

Q. When did the district do that?

A. These rules were adopted in, I believe, December, 1977.

Q. So that they were adopted before the rules themselves were enacted?

A. Yes.

Q. Your Honor, we will offer what has ben marked as Exhibit No. 3-B, which has been identified by the witness.

Mr. Schoon: The same objection, Your Honor, that the document lacks relevancy.

The Court: 3-B is received.

(Page 52) (Exhibit No. 3-B is hereby made a part of this bill of exceptions and may be found under separate cover)

Q. Now, Mr. Milner, has the district in addition to the rules and regulations we have already identified, have they enacted any other rules and regulations?

A. Yes.

Q. And what rules and regulations are those?

A. Runoff of, ground water runoff rules and regulations.

Q. Could you briefly describe what those rules and regulations provide?

A. Well, the rules that, are that if any ground water user allows water, ground water used to run off of his land, the district has rules that another landowner, an individual can complain and the district then takes the procedures that they have setup to control it.

Q. When did the district enact these, as you call them, runoff rules?

A. These rules were December of '75, and I believe on the other rules I said December. The board adopted them in November of '77, on the specifications rules. But these rules were adopted in December of 1975.

Q. I hand you Exhibit No. 5. Can you identify that please?

A. Yes.

Q. What is it?

A. This is the rules that the district adopted for ground (Page 53) water management act of, for ground water control of runoff water.

Q. Okay. Now, when did they adopt those?

A. I believe it was December of—I mean—Yeah, December of 1975.

Q. Your Honor, we will offer Exhibit No. 5 which has been identified by the witness.

Mr. Schoon: Your Honor, our objection to Exhibit No. 5 is that it is irrelevant. It is my understanding that from counsel's other remarks that the defendants are not being charged with runoff violations. And if they were, it would be outside of the pleadings of this matter, and Exhibit 5 is irrelevant.

Mr. Smith: Your Honor, I might help the court out a little bit on that. I think it is on the second or third page of Exhibit 5, the rules and regulations also define wells and illegal wells, and refers to wells that transport ground water interstate. So, they do have application here, I believe.

The Court: We will receive Exhibit No. 5.

(Exhibit No. 5 is hereby made a part of this bill of exceptions and may be found under separate cover)

(By Mr. Smith) Q. Now, Mr. Milner, you have identified and the court has taken into evidence two sets of

rules and regulations along with an appendix. Since those rules have been adopted, has the district put them into operation?

(Page 54) A. Yes.

Q. You are currently enforcing those rules and regulations?

A. Yes.

Q. No further questions, Your Honor.

• • •

(Page 62) JOY D. SPORHASE

Being first duly sworn, to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Dudden:

Q. Mr. Sporhase, would you state your name please.

A. Joy D. Sporhase.

(Page 63) Q. And where do you reside, sir?

A. Holyoke, Colorado.

Q. Are you one of the defendants in this action?

A. Yes.

Q. Mr. Sporhase, are you one of the owners of the well identified as Registration No. 33893?

A. Part owner.

Q. And who is the other owner with you?

A. Delmer Moss.

Q. And is he your partner?

A. Yes, sir.

Q. Mr. Sporhase, do you recall when you became the owner or approximately when you became the owner of that well?

A. In February of 1972.

Q. And did the two of you, Mr. Moss and yourself, purchase the well at the same time together?

A. Yes.

Q. And is that well located upon land situated in the State of Nebraska?

A. Yes.

Q. Yes or no? Is the well located upon land situated in the State of Nebraska?

A. Yes.

Q. Mr. Sporhase, I would hand you what has been marked as Exhibit No. 12, which is a map of some real estate with a legal (Page 64) description on it, and could you review that and tell me whether or not your well is located on that map?

A. Yes, it is.

Q. And is that well, the location that is shown on Exhibit 12, the well in question here?

A. Yes.

Q. Mr. Sporhase, looking at that map, could you tell the court what land you are irrigating from that well?

A. Well, we are irrigating the land across the road.

Q. Which direction, across the road which direction?

A. West.

Q. To the west?

A. Right.

Q. And that is in what state?

A. Colorado.

Q. Now, are you irrigating any other land from that well?

A. Yes and no, sometimes we do and sometimes we don't.

Q. What method of irrigation are you using through that well?

A. Sprinkler, and on the Nebraska side some flood.

Q. When you first purchased this land, did you have installed a sprinkler system on the Colorado land?

A. We had it installed afterwards.

Q. After you purchased it?

A. Right.

EXHIBIT 1

Department of Water Resources
Dan S. Jones, Jr. Director

Irrigation, Water
Power and Drainage,
Registration of Wells

STATE OF NEBRASKA
J. James Exon, Governor
P. O. Box 94607
Lincoln, Nebraska 68509
January 25, 1971

In Reply Refer To
G-33893

Mr. Edwin Cox
Colorado-Nebraska Farms, Inc.
Holyoke, Colorado 80734

Dear Mr. Cox:

You will please find enclosed receipt No. 30551 in the amount of $7.50 covering the registration fee on an irrigation well located in the NW¼NE¼ of Section 26, Township 7 North, Range 42 West of the 6th P. M., Chase County, Nebraska. This registration, identified as No. G-33893, was filed upon our records on the 18th day of Jan., 1971.

We should like to suggest that this letter and the receipt be placed in your permanent files for the reason it is your official record of this registration.

Very truly yours,

DEPARTMENT OF WATER RESOURCES
(Mrs.) Thelma Pangle, Clerk

tp
Enclosure

Below is the name and address of the original owner of the well registered as No. G-33893, together with any change recorded in this office.

Date Recorded—Jan. 18, 1971.

Original Owner—Nebraska-Colorado Farms, Inc.

Address—Holyoke, Colo.

Date Recorded—Oct. 30, 1975.

Present Owner—Sporhase & Moss

Address—Holyoke, Colo.

Registration No. G-33893 County of Chase

Date Filed January 18, 1971

STATE OF NEBRASKA
IRRIGATION WELL REGISTRATION

I, Colorado-Nebraska Farms Inc. of Holyoke, Colorado, County of Phillips, State of Colorado, being first duly sworn upon my oath say:

1st. That the name of the owner of the land upon which the irrigation well is located is ....., of Same Street, ... County of ..... State of .....

2nd. That the irrigation well is located on the NW Quarter of the NE Quarter of Section 26, Township 7, Range 42 of the Sixth P. M., Chase County, and is 30 feet from the North line and 35 feet from the West line of said tract.

3rd. That the well was installed with the intention of irrigating all or parts of the following described land: Pt of E½ of E½ of Sec. 26-7-42 Chase County & NE¼ of Sec. 29-7-42 Phillips County, Colo., amounting in all to approximately 160 acres.

(If installation consists of a battery of wells with one outlet, give details on a sheet to be attached hereto.)

4th. That the capacity of said well under normal operating conditions is 1200 gallons per minute.

5th. That the depth of the well is 235 feet, measured from the surface of the ground.

6th. That the inside diameter of the casing is 16 inches.

7th. That the static water level in the well is 52 feet below ground surface.

8th. That the depth to water under normal pumping conditions is 67 feet below ground surface.

9th. That the diameter of the pump column is 8⅝ inches. That the diameter of the 5 bowl or bowls is 12 inches.

10th. That the type and size of impeller is as follows: Open

11th. That the well was completed on or about the 15 day of July, 1970.

12th. That attached hereto are three copies of the log of the well certified to by the driller of the well.

13th. That the driller of this well is Stewart Drilling Co., whose address is Rout 3, Sterling Colo. 80751.

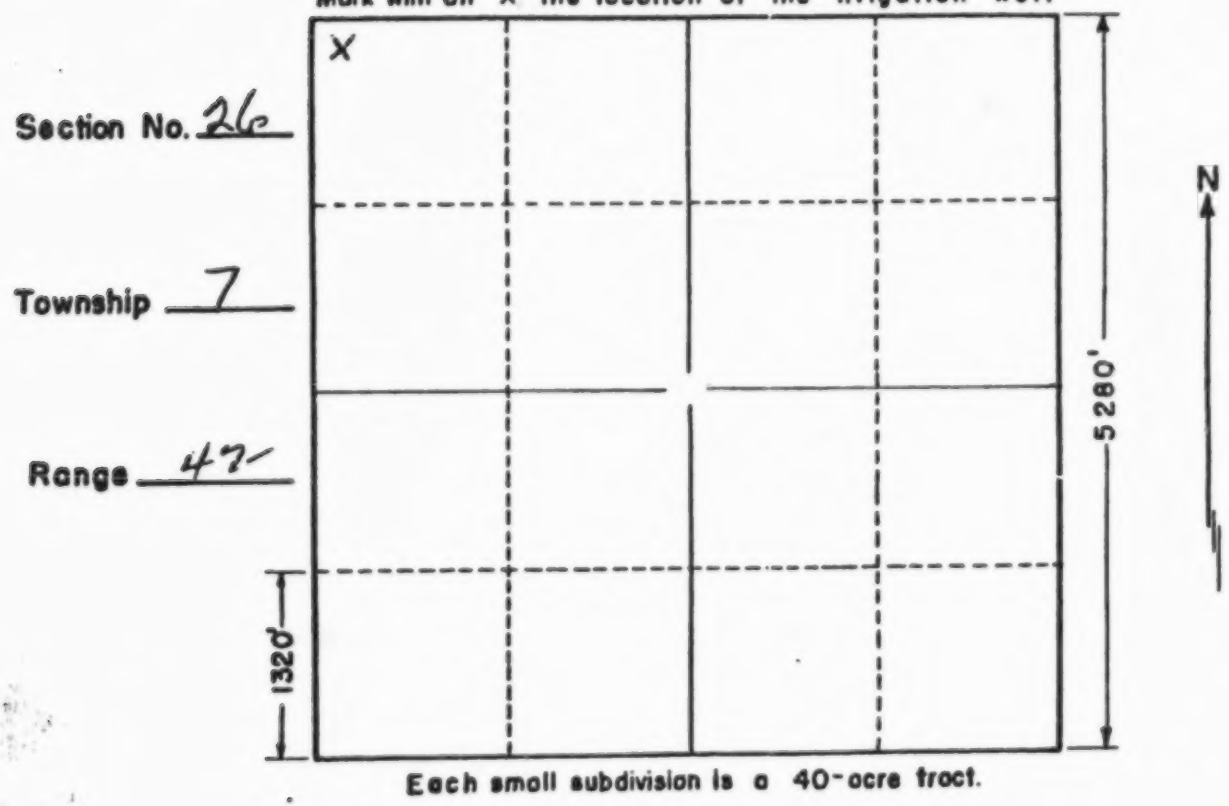
14th. That the name of the tenant or operator, if other than the owner, is....., whose address is .....

15th. That the relation which the subscriber to this instrument bears to said registrant is that of stockholder and that he is authorized to sign this instrument in behalf of the interest affected.

Signed: /s/ Edwin Axe
Dated: 1-15-'71

This drawing represents one Section

Mark with an "X" the location of the irrigation well



State of Nebraska)
) ss.
Department of Water Resources)

This instrument was filed for record at 1:15 o'clock P. M., on the 18th day of Jan. 1971.

/s/ Dan S. Jones, Jr.
Director of Water Resources

Registration No. G-33893 County of Chase

Date Filed Jan. 18, 1971

STATE OF NEBRASKA
CERTIFICATE OF WELL DRILLER

I, Stewart Drilling Co. of Rout 3, Sterling, Colo. County of Logan, State of Colo., do hereby certify that:

1. I am the driller of an irrigation well located on the North Quarter, Section No. 26, Township 7 North, Range 42, owned by Colorado-Nebraska Farms, Inc., whose postoffice address is Holyoke, State of Colorado.

2. That the drilling was begun on the 1 day of July, 1970, and completed on the 15 day of July, 1970.

3. That the well is cased and screened in the following manner: 155 ft. 16" Plaine, 80 ft. 16" Perfated.

4. That the diameter of drilled hole is 26 inches.

5. That Rotary type of drilling machinery was used.

6. That the drilled hole is/is not sealed, as follows: Gravel Packed.

7. That the following is an accurate log of the depth, thickness and character of the different strata penetrated, and the location of water-bearing strata:

DEPTH IN FEET FROM	TO	MATERIAL DRILLED
0	4	Top Soil
4	20	Mog. Clay, & Sand
20	55	Clay, Sand, Sandstone, & Gravel Str.

55	114	Sandstone, Limestone, Sand, Clay, & Gravel Str.
114	180	Clay, Sand, & Gravel Str.
180	200	Sand, Gravel, Limestone, & Some Clay Str.
200	232	Sand, & Gravel
232	235	Clay

1-15-'71

This well was not completed at the time it was test pumped. Also, the well was placed on a correction line quarter section which carries a section number designated as a part of the east ½ of the east ½ of section 26, there being no west ½ of this section.

Edwin Axe

EXHIBIT 2

STATE OF NEBRASKA
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF A REQUEST FILED BY THE UPPER REPUBLICAN NATURAL RESOURCES DISTRICT FOR CREATION OF A GROUND WATER CONTROL AREA.

O R D E R
GRANTING A REQUEST TO CREATE A GROUND WATER CONTROL AREA

The above entitled matter has come on for consideration by the Director of Water Resources at this time. The Director after gathering all available information pertinent thereto is duly advised and upon consideration makes the following findings of fact and conclusions of law:

1. In accordance with § 46-658, R. R. S., 1943 (Cum. Supp.) the Upper Republican Natural Resources District requested the Director to hold a hearing for the purpose of gathering information relevant to possible creation of a Ground Water Control Area. Upon receipt of that request on December 13, 1976, arrangements were made with the District to fix a time and location for the hearing. Following proper notice a public hearing was held at Imperial, Nebraska on March 24, 1977. At the hearing speakers represented several Natural Resources Districts, the Natural Resources Commission, the Conservation and Survey Division of the University of Nebraska, the United States Bureau of Reclamation, irrigation districts or themselves. Information presented were verbal statements,

published technical materials and the results of a comprehensive mathematical model study of the aquifer system (i.e., the Ogallala formation and deposits of more recent geological age) underlying the District. Model results of two scenarios address themselves to historical developments and to projections of current and expected demands (Exhibit 4.1, Figures "C" and "D") upon the aquifer system.

Following review of all materials the Director's preliminary conclusions were revealed to the District, the Natural Resources Commission and the Conservation and Survey Division for their consultation in accordance with § 46-658(3). Their advise was duly considered.

2. Within the District the number of irrigation wells registered with the Department of Water Resources in accordance with § 46-602 has increased by more than 550 percent during the past 20 years. Records of more than 2,300 registered irrigation wells were contained in the Department's files at the time of the hearing. In addition ground water levels as measured in wells (an indicator of supply) have declined over the same time period throughout a considerable portion of the District (Exhibit 4.1). Several observation well hydrographs reveal the tendency of a continuous ground water decline during that time despite seasonal fluctuations attributed to precipitation and partial recovery following cessation of irrigation withdrawals.

Ground water development and consequent demand has been the primary cause of the observed decrease in supply. Withdrawals from the ground water reservoir have exceeded replenishment to it in much of the Dis-

trict. Results of the model study (Exhibit 4.1) indicate a general and continued further lowering of ground water levels is to be expected. Barring importation of supplemental supplies, present and anticipated additional ground water development will further reduce available supplies.

3. Conflicts among users of the ground water supply fall into two categories—disputes solely among water well operators and disputes between water well operators and surface water users dependent upon the natural flow of streams draining the District. Both categories involve conflicts over available water supplies to be utilized for beneficial purposes.

Conflicts solely among current water well operators are not extensively documented. Exhibit 4.1 points to a reduction in supply (198,600 acre-feet per year in 1974) as the quantity of water contained in storage diminishes. Eventual conflicts among well operators are expected to intensify as available supplies become more scarce.

Conflicts between well operators in the District and surface water irrigators both within and outside the District currently exist and will intensify. Available evidence clearly indicates that ground water development and use within much of the District has and will continue to deplete the flow of the Frenchman River, Stinking Water and Spring Creeks (Exhibits 4.1 and 5). Upstream reduction in those flows will result in lesser quantities of water being stored in Enders Reservoir or being available for natural flow demand downstream. Surface water irrigators within the District and the U. S. Bureau of Reclamation's Frenchman Unit are thus adversely affected.

4. Substantial economic hardships are not deemed to now exist as a result of current ground water with-

drawals. Some fairly widespread declines in supply are acknowledged, but significant regional hardships are not documented fact. Costs resulting from the deepening of wells and lowering of pumps have been incurred by individuals, but are considered a necessary consequence of continued resource exploitation rather than a substantial economic hardship.

Substantial economic hardships are foreseeable based upon projections of a continued decline in ground water availability. Significant further declines in the ground water supply are expected to lead to a reduction in economic prosperity both inside the District and within the Frenchman Unit.

5. That point in time when utilization of the water supply will cause increased conflicts among users and substantial economic hardships will vary in different portions of the District. Ground water declines over all portions of the District except that portion which lies south of the Republican River are sufficient to indicate such adversities will occur within the foreseeable future.

6. Based on the foregoing, the ground water supply is found to be *inadequate* to meet present or reasonably foreseeable needs for beneficial use of such water supply in all portions of the District except that portion south of the Republican River. Conflicts among users are occurring and may be reasonably anticipated to increase. Substantial economic hardships of a regional nature which affect the prosperity of that region are foreseeable as a direct result of current and anticipated ground water decline rates.

IT IS THEREFORE CONSIDERED, FOUND AND ORDERED that a Ground Water Control Area be established within the Upper Republican Natural Resources District.

IT IS FURTHER ORDERED that the control area shall encompass all of Perkins and Chase counties and that portion of Dundy County lying north of the centerline of the Republican River and its North Fork tributary and shall include the rock unit known as the Ogallala Formation and all other deposits of a more recent geological age within those boundaries.

IT IS FURTHER ORDERED that effective September 1, 1977, individual permits from the Department of Water Resources shall be required prior to construction of all new water wells except those having a capacity less than 100 gallons per minute and which are to be used solely for domestic purposes as defined in § 46-613 within the designated Ground Water Control Area.

IN WITNESS WHEREOF I have hereunto set my hand and have caused to be affixed the seal of the Department of Water Resources this 1st day of August, 1977.

J. JAMES EXON, Governor of Nebraska
Department of Water Resources

/s/ M. E. Ball
Director of Water Resources

Dated August 1, 1977

EXHIBIT 3

STATE OF NEBRASKA

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT

ORDER NO. 1

RULES AND REGULATIONS FOR GROUNDWATER CONTROL

Pursuant to Section 46-666 R. S. Supp., 1976, and subject to approval by the Director of Water Resources, State of Nebraska, the following controls are hereby adopted for the Control Area established within the Upper Republican Natural Resources District by the Director of Water Resources, State of Nebraska, by order dated August 1, 1977:

Rule 1. *Definitions.* As used in these regulations of the Upper Republican Natural Resources District for administration of the control of groundwater within the Control Area as ordered by the Director of the Nebraska Department of Water Resources:

a. *Board or Board of Directors* shall mean the elected Board of Directors of the Upper Republican Natural Resources District.

b. *Control Area* shall mean all of Perkins and Chase Counties and that portion of Dundy County lying North of the centerline of the Republican River and its North Fork Tributary and shall include the rock unit known as the Ogallala Formation and all other deposits of a more recent geological age with-

in those boundaries as ordered by the Director of the Nebraska Department of Water Resources, August 1, 1977.

e. *Township* shall mean a unit of territory identified by U. S. Government Survey by a township number and a range number, nominally six (6) miles square and consisting of sections numbered from one (1) through thirty-six (36). When any such township is incomplete, or lies partly within and partly without the Control Area, that part lying within the Control Area shall be deemed a township.

d. *Critical Township* shall mean any township within the Control Area determined by the Board to have an annual decline of the groundwater table exceeding one percent of the saturated thickness of the aquifer as determined by yearly groundwater water measurements of observation and continuous recorder wells throughout the Control Area. The saturated thickness of the aquifer shall be the average saturated thickness of the aquifer for the three year period ending with each spring observation well and March continuous recorder well groundwater table measurement throughout the Control Area. The groundwater table shall be the groundwater table as determined by averaging the annual groundwater table measurement for the three year period end-

ing with each spring observation and continuous recorder well measurements. On the effective date of these regulations, the following townships are designated as critical:

DUNDY COUNTY

Township, North	Range, West
1	38
1	39
2	38
2	39
3	36

CHASE COUNTY

5	42
7	38
7	39
7	40
7	41
7	42
8	39
8	40
8	41
8	42

PERKINS COUNTY

9	39
9	41
10	40
10	41
11	40
11	41

Townships within the Control Area may be added to or deleted from the list of Critical Townships from time to time by amendment to these regulations.

e. *District* shall mean the Upper Republican Natural Resources District.

f. *Flow meter* shall mean an mechanical device of a type or design approved by the Board, installed on a well, or in conjunction therewith, which, when properly installed, measures and totalizes the amount of groundwater pumped, withdrawn, or taken from the well.

g. *Groundwater* shall mean that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.

h. *Groundwater User* shall mean any person who at anytime after the effective date of these regulations, extracts or withdraws groundwater for any use by himself or other persons at a rate equal to or in excess of 100 gallons per minute.

i. *Illegal Well* shall mean any well constructed or operated in violation of these regulations; or of any applicable Statutes, laws, rules, or regulations of the State of Nebraska.

j. *Acre Inch* shall mean the amount of water that will cover one surface acre to the

depth of one (1) inch, or twenty-seven thousand, one hundred fifty-four (27,154) gallons.

k. *Irrigated Acre* shall mean any acre of ground upon which groundwater has been applied for agriculture purposes and which has been certified as such by the Board pursuant to these regulations.

l. *Person* shall mean a natural person, personal representative, trustee, guardian, conservator, partnership, association, corporation, municipality irrigation district, and any agency or political sub-division of the State of Nebraska.

m. *Irrigation Season* shall mean the 12 months of a calendar year.

n. *Continuous Recorder Well* shall mean a well installed for continuous recording of groundwater levels of hourly, daily, monthly, and yearly recordings by a mechanical device.

o. *Observation Well* shall mean irrigation, domestic and industrial wells measured for groundwater table changes by the District each spring and fall.

p. *Well* shall mean any artificial opening or excavation in the ground from which groundwater flows under natural pressure or is artificially withdrawn. A series of wells developed and pumped as a single unit

shall be considered as one well. Any well of a capacity of less than 100 gallons per minute shall not be subject to these regulations, except as pertains to well spacing, unless said well is determined by the Board to be used, alone, or in conjunction with other wells for irrigation purposes. Permits are, however, required from the Nebraska Department of Water Resources for all such wells drilled after August 1, 1977, unless such wells are to be used solely for supply of groundwater for domestic purpose. Wells of a capacity of 100 gallons or more per minute not used for irrigation shall be deemed to be either municipal or industrial depending on their actual use. Municipal wells shall not be subject to these regulations, except as pertains to spacing and reporting. Industrial wells shall be subject to these rules and regulations, shall be installed with flow meters as provided herein, and shall be granted groundwater allocations by timely amendment to these regulations.

Rule 2. *Statement of Objectives and Goals*

a. The Board's initial objective in the implementation of these rules and regulations controlling the use of groundwater within the Control Area is to encourage the installation of properly calibrated and accurate flow meters upon every well located

within the Control Area. The Board has established certain incentives to encourage the early installation of flow meters. The incentives for installing flow meters prior to use of groundwater in 1978 are greater than the incentives for those persons who do not install flow meters until using groundwater in 1979 or in 1980. The rules and regulations adopted by the Board provide that flow meters must be installed upon all wells before groundwater is used from any such well in calendar years 1980. The incentives for the early installation of flow meters are enumerated in paragraph 3 of these regulations.

b. It is the goal of the Board to ascertain the amount of groundwater being withdrawn from the aquifer within the Control Area as well as to determine the saturated thickness thereof. It is further desired that accurate data be complied regarding the amount of groundwater used for particular types of crops grown within the area. The information provided by the correct installation and reading of flow meters within the Control Area pursuant to the rules and regulations, should enable the Board to set future goals to implement a manageable rate of decline in the groundwater table of one percent of the saturated thickness of the aquifer per year.

c. It is the intention of the Board to use the years 1978 and 1979 for the compilation of sufficient data regarding the use of groundwater within the Control Area to enable the Board to establish allocations of groundwater use for the five year period commencing 1980 and ending 1984. The allocation so made shall be one in gross for the five year period, thereby allowing the groundwater user to plan the use of groundwater for the entire five year period. It is anticipated by the Board that the in gross allocation for the period 1980 through 1984 shall be 70 to 85 acre inches per irrigated acre.

d. It is an objective of the Board to adopt rules and regulations prior to 1980 regarding the transfer or pooling of groundwater allocations by groundwater users. Transfers and pooling shall only be permitted between lands owned by or under the control of the same groundwater user. Transfers or pooling arrangements between more than one groundwater user shall not be permitted. Transfers or pooling arrangements involving lands within a critical township must be accomplished without regard to any lands situated in any non-critical township unless such last mentioned lands are contiguous to the lands within the critical township. In no case shall a transfer or

pooling arrangement be allowed to result in more groundwater being withdrawn from the aquifer within a critical township than the groundwater user has been allocated for irrigated acres within the critical township. In no case shall wells drilled after the effective date of these regulations be made a part of any transfer or pooling arrangement. All transfers and pooling arrangements must be approved by the Board prior to their implementation.

e. Wells drilled and equipped for irrigation purposes after the effective date of these regulations shall be granted an allocation based upon the acres the well and equipment can reasonably be used to irrigate. Any incentive program which pertains to a period of time prior to the date of equipping a new well shall not be available to that well. Any well in existence on the effective date of these regulations but not equipped for irrigation use shall not be deemed a well for the purpose of receiving all allocation until suitable equipment is in place and ready for service.

f. Any groundwater user having control of a tract of land for which a groundwater allocation has been granted who is not the owner of said tract shall not implement a transfer or pooling arrangement without the prior written approval of the owner of said tract and the Board.

Rule 3. *Flow Meters.* The following regulation applies to the installation, use and maintenance of flow meters installed on wells within the Control Area, and to the carryover incentive program relating to the installation of flow meters.

a. For a well to be eligible to receive any allocation granted by these or subsequent regulations of the District, any flow meter installed on any well within the Control Area after the effective date of these regulations, must meet the specifications for flow meters adopted by the Board, attached hereto as Appendix "A" and incorporated into these rules and regulations by this reference. Any such flow meter must also be installed according to the manufacturer's specifications. Flow meters installed before the effective date of these regulations are permitted but shall be checked by the District Staff for accuracy and determination of necessary calibration factors.

b. No well drilled after the effective date of these regulations shall be utilized for irrigation purposes within the Control Area prior to the installation of a flow meter in accordance with paragraph 3a, above. No well drilled prior to the effective date of these regulations shall be utilized for irrigation purposes within the Control Area in the calendar year 1980 or any subsequent

year prior to the installation of a flow meter in accordance with paragraph 3a, above.

c. Any groundwater user who violates paragraph 3b, above, shall be prohibited from using any such well until a flow meter is installed in accordance with paragraph 3a, above. In addition, such groundwater user shall forfeit such portion of his in gross allocation for the period 1980 through 1984 as is equal to one-fifth (1/5) of that allocation determined by the Board to be remaining on the date the District is first notified or otherwise becomes aware of such violation. The allocation remaining prior to such forfeiture shall be determined by the Board in accordance with the pro-rata formula set forth in paragraph 3f, below.

d. Any groundwater user, (1) who owns or has control over a well drilled prior to the effective date of these regulations located within the Control Area, and (2) who has previously installed a flow meter on such well, or who hereafter installs a flow meter thereon in accordance with paragraph 3a, above, prior to drawing water from said well for irrigation purposes in the calendar year 1980, and, (3) who complies in all respects with paragraphs 3g and 3h shall receive:

(1) An allocation of 40 acre inches per irrigated acre for the period 1978 and 1979

if such flow meter has been installed before drawing water from said well in the calendar year 1978. Such allocation shall be in gross for the said two year period, and any part of the allocation not used during the said two year period (up to a maximum of ten (10) acre inches per acre irrigated acre) may be carried forward to be used as a supplement to the allocation granted for the first five year allocation period, 1980 through 1984.

(2) An allocation of 18 acre inches per irrigated acre for the calendar year 1979 if such flow meter has not been installed before drawing water from said well in the calendar year 1978, but has been installed before drawing water from said well in the calendar year 1979. Any part of such allocation not used during the calendar year 1979 (up to a maximum of 5 acre inches per irrigated acre) may be carried forward to be used as a supplement to the allocation granted for the first five year allocation period, 1980 through 1984.

(3) An allocation of 20 acre inches per irrigated acre for calendar year 1979 provided said groundwater user:

(a) prior to July 1, 1978, shows to the Board, or Staff of District, good

cause why a flow meter was not installed on said well prior drawing water thereon in calendar year 1978.

(b) installs a flow meter on said well before drawing water from said well in calendar year 1979, in accordance with these rules and regulations.

Any part of such allocation not used during the calendar year 1979 (up to a maximum of 5 acre inches per irrigated acre) may be carried forward to be used as a supplement to the allocation granted for the first five year allocation period, 1980 through 1984.

e. For wells drilled and equipped with flow meters in accordance with paragraph 3a after the effective date of these regulations, but prior to December 31, 1979, an in gross allocation of 40 acre inches per irrigated acre is established.

(1) If any such well is drilled and equipped with a flow meter on or after July 1, 1978, but before August 1, 1978, the allocation shall be reduced by 5 acre inches per irrigated acre. The date used in determining the reduced allocation shall be the date the flow meter is checked for accuracy and

sealed by the District Staff. Any portion of such allocation not used prior to January 1, 1980, (up to a maximum of 8½ acre inches per irrigated acre) shall be carried forward as a supplement to the first five year's allocation period 1980 through 1984.

(2) If any such well is drilled and equipped with a flow meter on or after August 1, 1978, but before September 1, 1978, the allocation shall be reduced by 10 acre inches per irrigated acre. The date used in determining the reduced allocation shall be the date the flow meter is checked for accuracy and sealed by the District Staff. Any portion of such allocation not used prior to January 1, 1980 (up to a maximum of 7 acre inches per irrigated acre) shall be carried forward as a supplement to the first five year's allocation period 1980 through 1984.

(3) If any such well is drilled and equipped with a flow meter on or after September 1, 1978, but before July 1, 1979, the allocation shall be 18 acre inches per irrigated acre. Any portion of such allocation not used prior to January 1, 1980 (up to a maximum of 5 acre inches per irrigated acre) shall be carried forward as a supplement to the first five

year's allocation period 1980 through 1984.

(4) If any such well is drilled and equipped with a flow meter on or after July 1, 1979, but before August 1, 1979, the allocation shall be 13 acre inches per irrigated acre. Any portion of such allocation not used prior to January 1, 1980 (up to a maximum of 3½ acre inches per irrigated acre) shall be carried forward as a supplement to the first five year's allocation period 1980 through 1984.

(5) If any such well is drilled and equipped with a flow meter on or after August 1, 1979, but before September 1, 1979, the allocation shall be 8 acre inches per irrigated acre. Any portion of such allocation not used prior to January 1, 1980 (up to a maximum of 2 acre inches per irrigated acre) shall be carried forward as a supplement to the first five year's allocation period 1980 through 1984.

(6) No well drilled and equipped with a flow meter after September 1, 1979, shall qualify for any "carry forward incentive" provision of the rules and regulations. The date used for application of this paragraph shall be the

date the flow meter is checked for accuracy and sealed by the District Staff.

f. Any groundwater user who installs a new well within the Control Area after commencement of the 1980 irrigation season shall receive a reduced allocation for the remainder of the period 1980 through 1984. The reduced allocation shall be determined as follows:

(1) If one or more calendar years subsequent to the year 1979 have passed in full, the allocation shall first be reduced by the average number of acre inches per irrigated acre withdrawn by other groundwater user within the Control Area for such year or years. In no case shall the allocation be more than remaining year or years yearly allocation.

(2) If the date flow meter is checked for accuracy and sealed by the District Staff falls between July 1 and December 31 the allocation remaining shall be further reduced generally in accordance with the formula provided in paragraph 3e.

g. All groundwater users shall within 14 days of the installation of a flow meter on any well located within the Control Area report such installation on forms supplied by the

District. Groundwater users who on the effective date of these regulations have previously installed a flow meter on any such well shall submit such report not later than June 1, 1978. If in any case, the flow meter is not calibrated to the appropriate pipe size, the appropriate calibration factor shall be included in such report. The District Staff will, upon request, assist any groundwater user in the calculation of each calibration factor.

h. Each groundwater user within the Control Area shall take the final meter reading for every flow meter under his ownership or control no sooner than October 15 and no later than December 15 each year and report the same to the District by December 31 of the same year.

i. If any groundwater user within the Control Area fails to report by December 31 the meter reading for any flow meter under his ownership or control as required by paragraph 3h, above, the District Staff shall read same at a charge to the groundwater user of $25.00 and mileage at .20¢ per mile from the District office to the flow meter, both ways.

j. It shall be unlawful under these regulations for any person to wilfully injure, alter, remove, reset, adjust, manipulate, obstruct,

or in any other manner interfere with, or tamper any flow meter within the Control Area or to cause, procure or direct any other person to do so. Any groundwater user found guilty of wilful violation of this paragraph or of paragraphs 3g or 3l after a formal adjudicatory hearing by the Board shall forfeit up to 5 acre inches per irrigated acre per year for each year remaining in the then existing allocation period.

k. The District Staff shall periodically check flow meters on a random basis for reading and proper operation.

l. All flow meters within the Control Area shall be sealed by the District Staff. The District will notify the groundwater user in advance that it intends to enter upon his land for such purposes. No seal shall be removed without prior approval of the District Staff. Any person who removes any seal from any flow meter within the Control Area without such prior approval shall be subject to the provisions of paragraph 3j, above.

m. Any malfunctioning flow meter must be reported to the District Office at Imperial, Nebraska, within twenty-four hours after discovery. During the malfunctioning period, a "loaner" meter from the District, if available, shall be used to determine water consumption. If no such meter is avail-

able, any reasonable method of determining water consumption may be utilized.

n. The Board may grant a variance from the application of Rule 3 or any provision thereof to any groundwater user who demonstrates to the satisfaction of the Board that such user is unable to comply with any such rule, that such inability is caused by circumstances beyond the control of the groundwater user, and that failure to grant such a variance will work a severe hardship on such user.

Rule 4. *Irrigated Acres.* The following regulation applies to the determination and certification of irrigated acres under the ownership or control of groundwater users within the Control Area.

a. The number of irrigated acres belonging to or under the control of every groundwater user within the Control Area must be confirmed by him on forms provided by the District prior to receiving an allocation therefor. The Board will approve the number of irrigated acres for each groundwater user and shall periodically re-evaluate each determination from time to time. Failure by the groundwater user to confirm the number of irrigated acres under his ownership or control shall preclude the Board from granting any groundwater allocation to such groundwater user.

b. The number of irrigated acres belonging to or under the control of groundwater users who were irrigating their lands within the Control Area prior to the effective date of these regulations shall be the number of acres irrigated by such groundwater user during 1977, or the average number of acres irrigated during the years 1972 through 1976, whichever is greater.

c. The number of irrigated acres for lands placed under irrigation after the effective date of these regulations shall be determined by the Board by majority vote at a public meeting after consideration of all factors relative to said determination.

d. Irrigated acres, in all cases, shall be determined by the Board by majority vote at a public meeting and shall be based upon any one or more, or any combination of, the following criteria:

(1) Local A. S. C. S. records, if available.

(2) County Assessors records, if avilable.

(3) Suitable aerial photographs.

(4) Evidence adduced by the groundwater user at any public meeting of the Board.

(5) Evidence adduced by the Board's staff at any public meeting of the Board.

(6) As stated above, in all cases, the actual number of irrigated acres belonging to

or under control of any groundwater user shall be finally determined by the Board by majority vote at a public meeting.

e. Any groundwater user aggrieved by the determination of the Board as to the number of irrigated acres under his ownership or control may request a Formal/Adjudicatory hearing as provided in certain other rules and regulations of the Board pertaining thereto.

Rule 5. *Well Spacing.* The following regulation applies to the spacing of all wells subject to these regulations, located within the Control Area, and receiving permits from the Department of Water Resources after the effective date of these regulations.

a. In critical townships no well of a capacity of 100 gallons per minute or more may be drilled within 3300 feet of any existing well of a capacity of 100 gallons per minute or more.

b. Any irrigation well drilled in the Control Area after the effective date of these regulations, must be at least 1320 feet from any stock or domestic well not belonging to the groundwater user owning or controlling the land upon which said irrigation well is established.

Rule 6. *Well Spacing For Previously Irrigated Lands.* No tract of land within the Control Area shall

be denied a previously granted allocation of groundwater by operation of Rule 5.

Rule 7. *Municipal and Industrial Wells.* Owners of municipal and industrial wells within the Control Area shall report to the District on each January 15, the amount of groundwater withdrawn from each such well during the preceding calendar year.

Rule 8. *Severability of Rules.* If any rule or any part of any rule herein shall be declared invalid or unconstitutional, such declaration shall not effect the validity or constitutionality of the remaining portions thereof.

Rule 9. *The effective date.* These rules shall be effective commencing May 1, 1978.

Adopted this 7th day of February, 1978.

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT
/s/ W. Eugene Haarberg, Chairman

Attest:
/s/ Elsie Newman, Secretary

EXHIBIT 3-B

DEFINITION OF TERMS

1. MANUFACTURE: Shall mean the company that produces meters for the supplier or dealer.

2. SUPPLIER OR DEALER: Shall mean the company that sells or provides meters to the installer or groundwater user.

3. INSTALLER: Shall mean the company or groundwater user that installs meters on the groundwater users irrigation equipment.

4. DISTRICT: Shall mean the Upper Republican Natural Resources District.

5. GROUNDWATER USER: Shall mean any person who at anytime, extracts, withdraws, or confines groundwater for any use by himself, or other persons, at a rate in excess of 100 gallons per minute.

6. METER: Shall mean a mechanical device that measures and totalizes the amount of water flowing through a pipe.

7. PIPE: Shall mean any material capable of transporting water.

DISTRICT SPECIFICATIONS ON FLOW METERS

The meters furnished under these specifications, shall comply with the applicable provisions of American Water Works Association's standard number C704-70.

CALIBRATION

The meter shall be installed and calibrated to the pipe size. Calibration must maintain an accuracy of plus or minus 2 percent of normal flow range.

SPECIFICATIONS OF FLOW METERS

Water flow meters shall meet specifications stated herein.

1. Water meters shall be of the velocity propeller type made of noncorrosive materials. The meters shall have a magnetic drive. Propellers shall rotate on a minimum of two bearings. Bearings shall be made of stainless steel or equivalent non-corrosive material.

2. The meter registry shall have a visual volume recording totalizer which shall record in acre feet. The registry shall be protected from the elements. Totalizer shall have sufficient capacity to record for the period of one year the quantity of water diverted from each water source or a combination of sources or for installation supplied by multiple water sources. Totalizers shall be direct reading and the multiplier shall be clearly indicated. The meter shall also have a rate of flow indicator showing:

   a. instantaneous flow in gallons/minute or, b. a sweephand indicator from which rate of flow can be determined by timing.

3. The meter shall have a rated accuracy of plus or minus two percent of actual flow for all flow

within the range of flow for which the meter is designed. The meter shall be capable of accurately registering the expected operating range of discharge.

4. A meter shall have a pressure rating to fit the application used only within its designed pressure range.

5. The meter size, serial number, and the direction of flow shall be clearly stamped on the body of the meter. The inside pipe diameter for which the meter has been calibrated shall be clearly shown on the meter to the nearest 0.001 of an inch.

WATER FLOW METER INSTALLATION RECOMMENDATIONS

1. The meter shall be installed in accordance with the manufacturer's specifications and in such a manner that there will be a full pipe flow of water at all times while water is being measured. Full pipe flow may be obtained by using butterfly valves or by raising the pipe beyond the meter to a point above the level of the meter.

2. To increase accuracy, the meter shall be placed in the pipe not less than five pipe diameters downstream from any valve, elbows, or other obstructions which might create turbulent flow, or as recommended by the manufacturer. There shall also be at least one pipe diameter of unobstructed flow on the downstream side of the meter. Straightening vains shall be installed in the pipe if above conditions cannot be met.

3. It is recommended that provisions be made for future rating of meters. Such provisions may be made by:
   a. Using a weld-on saddle mount meter. This allows for easy removal and interchange of meters.
   b. Downstream turnout which would direct all flows through the rating meter.
   c. An open discharge pipe which would allow installing a rating meter.
   d. Any other means which would allow the easy installation of a rating meter.
   e. Installation of a mount for using a pitot tube type measuring device.
4. A single meter may be installed in such a manner to measure the combined flow of two or more water sources.
5. The meter propeller shaft shall be positioned parallel to the pipe and aligned with center line of the pipe.

SUGGESTER METER OPERATION AND MAINTENANCE

1. Meter should be kept clear of debris, vegetative growth or other material which would impede its operation.
2. When meters are removed for servicing or replacement, records of meter readings should be kept.
3. Meters should be stored in such a manner that will prevent freezing or damage by rodents.

The District may change these specifications by majority vote of the Board, at an official Board Meeting.

DISTRICT REQUIREMENTS

I. MANUFACTURER

1. Shall provide the District with names of all suppliers or dealers in the District.
2. Shall inform all suppliers or dealers that meters and installation must meet the District's regulations and specifications.
3. Shall provide the District with all designs and specifications of meters.
4. Manufacturer must be approved by the District.

II. SUPPLIER OR DEALER

Shall provide to the District:

1. The manufacturer and model of meter to be sold to the groundwater user.
2. Show proof of authorized supplier for manufacturer.
3. Names of installer if other than his company.
4. Shall provide the District with names of all persons that purchase meters that are not installed by his company.
5. Must be approved by the District.

III. INSTALLER

1. Shall install only meters approved by the District.
2. Provide to the District within five working days after installation:

A. Name of user

B. Legal description of installation

C. Model and serial number of meter

D. Pipe I D meter is calibrated for

E. Pipe I D meter is installed in.

3. Meter must be calibrated to pipe size before installation.

4. Shall install meter to the District and Manufacturer's specifications.

5. Must be approved by the District.

IV. METER

1. Shall totalize in acre feet.

2. Specification will be provided by the District.

3. Shall be approved by the District.

V. DISTRICT

1. Will inspect all meter installation within 5 working days.

A. Landowner or operator will be informed if meter or installation is improper.

B. Installer, company, and user will be informed if meter and installation meets the specifications.

VI. GROUNDWATER USER

1. District will inspect meter and installation.

2. District will notify user after inspection of approval or disapproval.

3. May install own meters.

4. Notify the District within 5 working days after the meter has been installed.

VII. PIPE

1. Must be of material that does not change shape when pipe is full or empty.

2. Inside and outside diameter must be within .001 inch of the pipe size.

Standard pipe size shall mean 6⅝, 8⅝, 10¾ outside diameter.

EXHIBIT 4

STATE OF NEBRASKA

DEPARTMENT OF WATER RESOURCES

In the Matter of Rules and Regulations for Ground Water Control Proposed For Adoption by the Upper Republican Natural Resources District.

ORDER OF APPROVAL

Now on this twenty-seventh day of March 1978 the above entitled matter came on for consideration by the Director of Water Resources. The Director upon consideration makes the following findings of fact and conclusions of law:

1. Pursuant to the provisions of § 46-666, R. R. S., 1943 (Cum. Supp.), there was filed in the office of the Department of Water Resources on the ninth day of February, 1978, a copy of Rules and Regulations for Ground

Water Control within a Ground Water Control Area previously established by the Director on August 1, 1977, and lying wholly within the Upper Republican Natural Resources District.

2. In accordance with § 46-666 the said rules and regulations have been examined by the Director and the same have been found to be satisfactory.

IT IS THEREFORE ORDERED that said Rules and Regulations for Ground Water Control proposed for adoption by the Upper Republican Natural Resources District be and the same are hereby approved.

IT IS FURTHER ORDERED that if any substantive changes in the rules and regulations are proposed that such proposed changes be submitted to the Director for prior approval.

IN WITNESS THEREOF I have hereunto set my hand and caused to be affixed the seal of the Department of Water Resources this twenty-seventh day of March 1978.

J. JAMES EXON, Governor of Nebraska
Department of Water Resources
/s/ John W. Neuberger
Director of Water Resources

EXHIBIT 5

RULES AND REGULATIONS FOR THE NEBRASKA GROUNDWATER MANAGEMENT ACT

Section A. *General Provisions*

Rule 1 *Definitions.* As used in these rules and regulations of the Upper Republican Natural Resources District for administration of the Nebraska Groundwater Management Act:

a. Irrigation run-off water shall mean groundwater used for irrigation purposes which flows from land owned, leased, or otherwise under the direct supervision and control of a groundwater user.

b. Groundwater shall mean that water which occurs or moves, seeps, filters, or percolates through ground under the surface of the land and shall include groundwater which becomes comingled with waters from surface sources.

c. Groundwater user shall mean any person who at any time extracts, withdraws, or confines groundwater for any use by himself or other persons at a rate in excess of 100 gallons per minute.

d. Person shall mean a natural person, partnership, association, corporation, municipality, irrigation district, any agency or political subdivision of the state and federal agency.

e. Improper irrigation run-off shall mean the occurrence of irrigation run-off water after Jan-

uary 1, 1977. (1) within a designated control area; (2) within an area designated by the Board as a "potential control area"; (3) which causes or contributes to the accumulation of water upon or beneath the surface of the lands of any person(s) to their detriment; (4) which causes or contributes to the deterioration of water quality by depositing sediment and/or associated chemicals in surface waters within the area.

f. District shall mean the Upper Republican Natural Resources District.

g. Illegal Well shall mean:

(i) Any well not registered pursuant to the provisions of section 46-602 to 46-605, R. R. S. 1943.,

(ii) Any well in violation of spacing requirements specified by sections 46-609 or 46-651, R. R. S. 1943.,

(iii) Any well utilized for application of fertilizer materials in violation of section 46-612.01, R. R. S. 1943.,

(iv) Any well or pit from which water is transported to an adjoining state in violation of section 46-613.01, R. R. S. 1943.,

(v) Any pit located within 50 feet of the bank of any natural stream and utilized for irrigation purposes without a permit issued pursuant to section 46-637, R. R. S. 1943.,

(vi) Any well the water from which flows under natural pressure in excess of the provisions of section 46-281, R. R. S. 1943., or

(vii) Any well constructed or operated in violation of these rules and regulations or of other applicable laws of the State of Nebraska.

(viii) Well or pit in which water is transported out of District to irrigate land not owned by the person constructing the said well or pit and not contigious to the District.

h. Board or board of directors shall mean the elected board of directors of the Upper Republican Natural Resources District.

i. Well shall mean any artificial opening of excavation in the ground through which groundwater flows under natural pressure or is artificially withdrawn. A series of wells developed and pumped as a single unit shall be considered as one well.

j. Potential control area shall mean an area designated by the Board in accordance with Rule 2 of this section as an area where conditions indicate that a need for establishment of a control area may be developing.

k. District compliance officer shall mean an employee or director of the district authorized to perform the functions assigned thereto by these rules and regulations.

Rule 2 "Potential Control Areas" may be designated by the Board only after public hearing within or in close proximity to the area proposed for such designation. The hearing shall be conducted in accordance with the Boards regulations for the conduct of informal non-adjudicatory hearings. In considering the propriety of any such designations, the Board shall determine whether there is a reasonable probability that the criteria specified for designation of control areas by section 46-658 (1975 Supp.), will be satisfied in the foreseeable future. Areas designated as "potential control areas" shall be defined and described geographically by the Board and such designation and description shall be published at least once each week for three consecutive weeks in a newspaper of general circulation within the area so described. Modifications in boundaries of potential control areas may be accomplished in the same manner as their original establishment.

Rule 3 A groundwater user may implement any structural or non-structural procedure, measure, or combination thereof which provides for effective prevention, control or abatement of improper groundwater irrigation run-off, including, but not limited to: (1) limitation of water utilized so that structural measures are not necessary to prevent irrigation run-off water and proper operation and management of the irrigation system, including any reuse or other control measures installed; (2) construction of a run-off collection and/or retention system such as a sump or dug-

out, together with a reuse pump and/or ditch to return the water to the same or other field for beneficial use; (3) blocking of rows or field borders to contain irrigation water within the property under the direct supervision or control of the groundwater user; (4) the execution and performance of an agreement between two or more persons and approved by the district for utilization of any irrigation run-off water in accordance with Rule 4 of this Section; or (5) any other acceptable procedure or measure.

Rule 4 Groundwater users whose irrigation run-off water is capable of being captured and utilized by another groundwater user or other person in a manner which will prevent waste of such water, deterioration of surface water quality, and accumulation of water upon the land of any other person without his consent may have such water excluded from the definition of improper irrigation run-off water by submitting to the District an agreement providing for such capture and utilization signed by all affected parties, on forms provided by the District. When such agreement is approved by the District it will show the District's concurrence that the groundwater user's irrigation run-off water is under adequate control. The agreement may be terminated at any time by either party or by the District whenever it determines that such agreement no longer prevents or controls improper irrigation run-off water. If the District terminates the agreement, written notice shall be provided to

both parties. If one of the parties to the agreement causes the termination, written notice shall be provided to the other party and to the District.

Section B

Procedures for Enforcement of the Nebraska Groundwater Management Act

Rule 1 *General.* The District shall enforce the provisions of LB 577, 84th Legislature, 1st Session (1975), and all rules and regulations adopted pursuant thereto by the issuance of cease and desist orders in accordance with the procedure hereinafter specified and by bringing appropriate actions in the district court of the county in which any violations occur for enforcement of such orders. Cease and desist orders may be issued for the following reasons:

a. Operation of an irrigation system in a manner which allows for improper groundwater irrigation run-off.

b. Construction or operation of an illegal well as defined in Section A of these rules and regulations.

c. Failure to make any report required by Section C of these rules and regulations.

Rule 2 *Complaints.* Any person who owns or leases land within the boundaries of the district, any person who resides within the district, any non-resident person who can show that the actions

of any groundwater irrigator within the district directly affects him, or the Board on its own motion may file a written complaint against a groundwater irrigator alleging a violation of these rules and regulations or that such irrigator is constructing or operating an illegal well. Complaints shall be filed at the office of the district, NRD of Imperial, Nebraska, or the Soil Conservation Offices, in the District, on complaint forms prepared by said district which shall be available at such office or at such other office or offices as from time to time the Board of Directors shall designate.

Rule 3 *Inspections.* The land where the alleged violation occurred shall be inspected by a person authorized by the Board to conduct such investigations within five (5) days following the day of the filing of the complaint exclusive of Saturdays, Sundays, and legal holidays. A copy of the complaint shall be delivered to the alleged violator in person, or at his place of residence, or be sent by certified mail prior to the inspection. The inspector, upon proper identification and after informing the person in control of the land of the inspector's purpose, is authorized to enter upon the land for the purposes of making an inspection of the alleged violation. Upon completion of the inspection, the inspector shall file a report of his findings in the district office and shall deliver a copy of said report to the alleged violator and to the complainant, if other than the Board, in person, or at their places of resi-

dence, or shall transmit the same by certified mail.

Rule 4 *Submission of Inspection Report Alleging Violation and Alleged Violators Alternatives.* If the inspector finds in his report that there is reasonable cause to believe that a groundwater user is at the time of inspection or was at the time complained of, in violation of these rules and regulations or constructing or operating an illegal well, said inspector's report, prepared and delivered in accordance with Rule 3 of this section, shall be accompanied by a formal notice of the Board's next rugular or special meeting date scheduled at least ten days subsequent to delivery of said notice. The notice shall also specify alternative actions available to the alleged violator which shall be as follows:

a. Agree with and accept as true and correct the inspector's findings that the alleged violation has in fact occurred or is occurring; consent to cease and desist from continuing or allowing the reoccurrence of such violation; and submit a plan which shall provide for the discontinuance and/or non-reoccurrence of the violation. If appropriate, such plan shall include the identification and description of all proposed procedures or measures to prevent, control, or abate improper groundwater irrigation run-off. The alleged violator shall simultaneously submit a schedule of compliance on forms provided by the district. The schedule of compliance shall provide for the sub-

mission of a work order within ten days following approval of the plan in the manner hereinafter provided.

b. Reject the findings of the inspector's report and request that a formal hearing be scheduled and conducted in accordance with the rules and regulations of the district.

The alleged violator shall be granted not less than seven (7) days from the date that said report and notice is provided to him to respond and to indicate any actions intended.

Rule 5 *Action Subsequent to Groundwater User Consent to Cease and Desist.* When an alleged violator has been notified in accordance with Rule 4 of this section and has consented to cease and desist in accordance therewith, a District compliance officer shall review the complaint, the inspector's report, the consent order and any plan for discontinuance and schedule of compliance to determine whether the actions agreed to by the groundwater user will, when applied, bring such user into compliance with these rules and regulations, prevent construction or operation of an illegal well, or prevent improper groundwater irrigation run-off. If the compliance officer determines that the proposed actions of the groundwater user are adequate and will prevent future non-compliance within a reasonable time period, he shall approve such action or plan and approve the schedule of compliance. If the District compliance officer determines

that implemntation of the proposed plan and/or schedule of compliance would be inadequate to prevent improper groundwater irrigation run-off, he shall indicate the additions or changes he deems necessary. Thereafter the groundwater user shall have five (5) days to consent to such additions or changes in the event of which the compliance officer shall approve the plan and/or schedule of compliance as amended, or, the groundwater user may refuse to agree to such additions or changes and request the scheduling of a formal hearing on the issues, which shall be held no less than ten days from the date of request. The original actions under Rule 4, Part a of this section and the documents filed in accordance therewith by the groundwater user shall not be considered at such hearing unless introduced into the record by that groundwater user. The complainant shall be notified of any action taken by the district compliance officer approving the plan and/or schedule of compliance submitted by the groundwater user within three (3) days following such approval. If no objections to the action taken are received from a complainant, other than the Board itself, or from any members of the Board if the Board is the complainant within five (5) days after such notification, the proposed plan and/or schedule of compliance shall be considered as having received final approval. If any such complainant or Board member objects to the approval granted by the compliance officer within five (5) days after notification, a formal hearing before the Board shall be scheduled not less than ten (10)

days following notification to all affected parties and shall be conducted in the same manner as if the groundwater user had requested the hearing in accordance with Rule 5 of this section.

Rule 6 *Board Action Subsequent to Groundwater User, Complainant, or Board Member Request for Hearing.* At a meeting of the Board prior to which an alleged violator, complaint, or Board member has, in accordance with Rule 4 or Rule 5 of this section requested a formal hearing, the Board shall hold such formal hearing. If, following a hearing, the Board determines that such groundwater user is violating or has violated these rules and regulations or is construction or operating an illegal well, it shall adopt and transmit to such groundwater user, in person or by certified mail, an order directing such user to immediately cease and desist from all activities determined by the Board to be violations and specifying any actions deemed necessary and appropriate by the Board.

Rule 7 *Board Action if Groundwater User Fails to Respond or Appeal.* At a meeting of the Board prior to which an alleged violator has been notified in accordance with Rule 4 or Rule 5 of this section and such alleged violator has failed to respond thereunder, or has failed to appear at any properly scheduled formal hearing, the Board shall review the complaint and the inspector's report as well as any other pertinent information and issue such order or orders in accordance with these rules and regulations as are deemed appropriate.

Rule 8 *Groundwater User's Actions Following Issuance of Cease and Desist Order.* Any Groundwater user against which a cease and desist order has been issued in accordance with these rules and regulations may within seven (7) days following receipt of such order, submit a schedule of compliance. Any such schedule of compliance requested shall be accompanied by a work order of forms provided by the district and the schedule of compliance and the work order shall be approved by the district compliance officer if such request is in accordance with any and all guidance given by the Board at the time of issuance of the order.

Rule 9 *Board Authorization to Initiate Court Action.* The Board shall, at the time it takes any action in accordance with Rules 6 or 7 of this section designate a representative of the Board to initiate appropriate legal actions in the district court of the county in which the violation has occurred ten days after the issuance of any orders of the District which orders have not been complied with nor a schedule of compliance approved. In addition, if any schedule of compliance or work order approved by the Board or the district compliance officer is not initiated as agreed to or is not being properly and timely carried out, unless due to circumstances beyond the control of the groundwater user, the Board shall authorize immediate initiation of appropriate litigation.

Section C

Reporting Requirements for Administration of The Nebraska Groundwater Management Act.

Rule 1 *Authority*

These rules and regulations are adopted pursuant to section 8, LB 577, 84th Legislature, 1st session (1975).

Rule 2 *Reporting Requirements*

a. Agricultural Irrigation User of Groundwater:

(1) Each groundwater user with irrigated lands under his supervision or control on or before March 1, 1976 within the district, shall, on or before that date submit to the district a sketch or sketches of all irrigated lands under his supervision and control. Each groundwater user installing new irrigation systems on or after March 1, 1976 shall, no less than 60 days prior to such installation, submit to the district a sketch or sketches of all lands intended to be irrigated by that new system. Sketches shall be resubmitted within 30 days of the time any major changes occur or control systems have been installed. The sketch or sketches shall be made on forms provided by the district and shall include, but not be limited to:

(a) Identity by quarter-quarter section, township and range the location of each irrigated field and the exact acreage therein.

(b) Location of each irrigation well and the State Department of Water Resources registration numbers of each.

(c) Identification and location of all irrigation and control systems, sumps or other measures of control and an indication of how the irrigation water run-off is used.

(d) The permit numbers issued by the State Department of Water Resources for surface water used or storage rights whenever the control system identified in the sketch involves such use or storage and the amount of water authorized for appropriation.

(e) An estimate of water to be used and an indication of how water use is to be measured in the future.

(f) A certificate signed by the groundwater user certifying that the sketch and information thereon is true and correct to the best of his knowledge.

(g) Each groundwater user in this category shall on or before January 1 of each year submit to the District a report indicating the number of acres irrigated and amount of water withdrawn during the reporting period.

b. Municipalities and Other Water System Operations Primarily Providing Water for Domestic Supply From Groundwater sources, (Including but not limited to cities and villages, rural water districts, water associations, sanitary and improvement districts, and natural resources districts.)

(1) Each present groundwater user in this category deriving its supply in whole or in part within the district shall, on or before March 1, 1976 submit to the district on forms provided therefore, the following information, to-wit:

(a) Location by legal description of all wells within the district under the supervision or control of such user and the capacity of the pump or pumps installed therein.

(b) A topographic map locating the service area and indicating the supply lines from the well field to the service area and including delineation of all service lines outside the corporate limits of a village or city.

(c) Estimates of current percentages of use for domestic, industrial and business; and municipal uses.

(d) A copy of the rate structure for water services provided.

(e) Total water supplied by the user annually for the last ten years or

since the system has been in operation whichever is less.

(f) A certificate signed by the person submitting the report which certifies that the report is true and correct to the best of his knowledge.

(2) Each groundwater user in this category which installs a new system deriving its supply in whole or in part within the district shall within 90 days of the registration of its wells submit to the district on forms provided therefore, the information called for in items (a) through (d) and (f) above.

(3) Each groundwater user in this category deriving its supply in whole or in part within the district shall annually on or before January 1 submit to the district a report of actual water supplied by its system and shall specifically address any significant changes in its system covered by subsection b(1) above.

c. All Other Users:

(1) All other present groundwater users as defined by these rules and regulations and deriving their supply from within the district shall on or before March 1, 1976 submit to the district on forms provided therefore, the following information, to-wit:

(a) Location by legal description of all wells within the district and under the

supervision or control of such users and the capacity of the pump or pumps installed therein.

(b) Total water withdrawn by the user annually for the last ten years or since the use commenced, whichever is less, and an explanation of how the total was determined if other than by metering.

(c) The nature of the use to which the water is being put and the amount and method of disposal of any water remaining after such use.

(d) Any other pertinent information.

(e) A certificate signed by the person submitting the report which certifies that the report is true and correct to the best of his knowledge.

(2) Each groundwater user in this category which installs a new well within the district shall within 90 days of the registration of said well submit to the district on forms provided therefore, the information called for in items (a) through (e) above, estimating as accurately as possible the amount of withdrawal and the amount remaining after use.

(3) Each groundwater user in this category deriving its supply from within the district shall annually on or before January 1 sub-

mit to the district a report of actual water used and water remaining after such use, and shall specifically address any significant changes in the information provided pursuant to subsection e(1).

Rule 3 *District Action on Required Reports.*

a. The district shall, on or before July 1, 1976, or within 60 days of receipt, whichever is later, review all documents received with them in accordance with Rule 2 of this section and shall determine whether they are complete. If any such documents are not received or if it is determined that any such documents are not complete, the person responsible for the submission thereof shall be so notified by certified mail and shall be ordered to fully comply with said Rule 2 within 30 days after the date of such order.

b. In addition to action taken by the district in accordance with subsection a of this Rule, the district shall also review all documents submitted by agricultural irrigation users of groundwater in accordance with Rule 2 of this section for the purpose of classifying the irrigation and control systems of such users into one of the following two categories:

(1) Those systems which appear to the district to be capable of preventing improper groundwater irrigation run-off when properly managed.

(2) Those systems which appear to the district, if not altered or modified, to be incapable of preventing improper groundwater irrigation run-off.

All agricultural irrigation users of groundwater shall be notified of the district's action pursuant to this section by July 1, 1976 or within 60 days after receipt by the district of the material submitted, whichever date is later. Simultaneously with such notification, the district may recommend such structural or nonstructural measures as it deems necessary to prevent or abate improper groundwater irrigation run-off from the subject lands.

EXHIBIT 11

STIPULATION

(Filed January 12, 1979)

1.

The relator, Paul L. Douglas, was a duly elected, qualified and acting Attorney General of the State of Nebraska, at the commencement of this action, and has since continued in that capacity at all times relevant to this action.

2.

This action was brought by the relator after an investigation of the relator had revealed that there was sufficient legal merit to justify the proceedings and after a request by Marion Ball, the then head of the Department of Water Resources of the State of Nebraska, to commence these proceedings.

3.

The defendants are residents of Phillips County, Colorado. The defendants own and operate an irrigation well located upon lands owned by the defendants in the NE¼ Sec. 26, T7N, R42W, Chase County, Nebraska (hereinafter Nebraska lands). This irrigation well was registered with the Department of Water Resources of the State of Nebraska by the defendants' predecessors in title on January 18, 1971. The Registration No. is G-33893.

5.

The defendants are also the owners of lands located in Colorado, namely the NE¼ Sec. 29, T7N, R42W, Phil-

lips County, Colorado (hereinafter, Colorado lands). Since 1972, the defendants and their predecessors in title, through an underground piping system, have transported ground waters from their well located upon the Nebraska lands to irrigation systems, located upon and which irrigate crops on defendants' Colorado lands.

STATE OF NEBRASKA, EX REL.,
PAUL L. DOUGLAS, Attorney General,
Plaintiff,

By PAUL L. DOUGLAS
Attorney General

By /s/ Steven C. Smith
Special Assistant Attorney General

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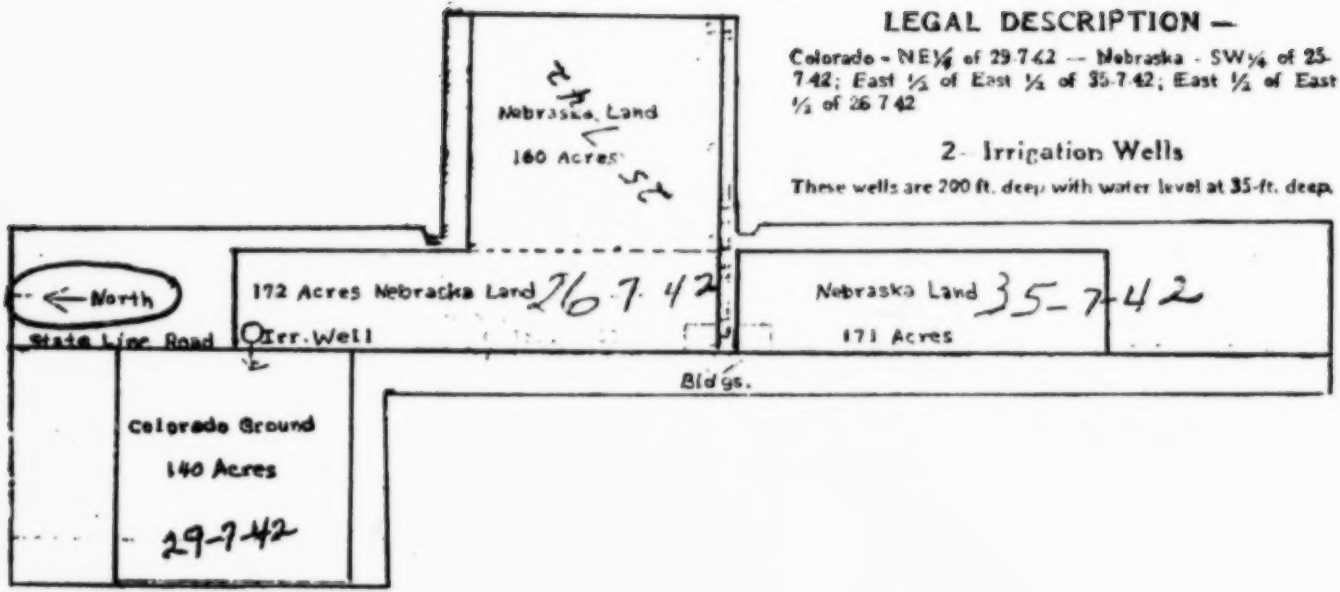
JOY SPORHASE and DELMER MOSS,
Defendants,

By /s/ Peter E. Schoon, Jr.

Padley & Dudden, P. C.

237 South Campbell
Holyoke, Colorado 80734
Telephone: (303) 854-2922

EXHIBIT 12


LEGAL DESCRIPTION —
Colorado - NE¼ of 29-7-42 — Nebraska - SW¼ of 25-7-42; East ½ of East ½ of 35-7-42; East ½ of East ½ of 26-7-42
2 - Irrigation Wells
These wells are 200 ft. deep with water level at 35-ft. deep.
Nebraska Land
160 Acres
25
35
26-7-42
172 Acres Nebraska Land
North
State Line Road
Irr. Well
Nebraska Land 35-7-42
171 Acres
Bldgs.
Colorado Ground
140 Acres
29-7-42

NEBRASKA SUPREME COURT OPINION

208 Neb. 703

Filed May 8, 1981. No. 43206.

1. *Constitutional Law.* In order for the commerce clause of the U. S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce.

2. *Waters.* Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.

3. *Constitutional Law: Waters.* The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want.

4. *Legislature: Waters.* Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land.

5. *Legislative Power: Waters.* The Legislature has the power to determine public policy with regard to ground water.

6. *Legislature: Waters.* Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

7. *Waters.* Free transfer and exchange of ground water in a market setting have never been permitted in this state.

8. ———. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.

9. ———. Nebraska ground water is not an article of commerce.

10. ———. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution.

11. *Constitutional Law: Statutes: Waters.* Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

12. *Waters: Constitutional Law.* Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law.

13. *Legislative Delegation.* The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend.

14. *Waters.* The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of sev-

eral conditions which must be satisfied before a permit to transfer ground water out of state may issue.

15. *Waters.* Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the affected class.

Appeal from the District Court for Chase County: Jack H. Hendrix, Judge. Affirmed.

Peter E. Schoon, Jr. and George M. Zeilinger of Padley & Dudden, P.C., for appellants.

Steven C. Smith, Special Assistant Attorney General, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

Heard before Krivosha, C. J., Boslaugh, McCown, Clinton, Brodkey, White, and Hastings, JJ.

White, J.

Appellants own adjacent tracts of land in Chase County, Nebraska, and in Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for the purpose of irrigating crops on both the Nebraska tract and the Colorado tract. Defendants' predecessor in title registered the well with the State of Nebraska on January 18, 1971, as required by Neb. Rev. Stat. § 46-602 (Reissue 1978). However, neither the defendants nor their predecessor in title applied to the Nebraska Department of Water Resources for a permit to transport ground water from the Nebraska well across

the border into Colorado as required by Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The State of Nebraska brought this action in the District Court of Chase County to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. After trial on the merits, the District Court issued the injunction, holding that § 46-613.01 does not violate the commerce clause of U. S. Const. art. I, § 8, since under Nebraska law water is not an article of commerce. The District Court also held that even if ground water is an article of commerce, the statute does not impose an unreasonable burden of interstate commerce. We affirm.

We start our analysis with the assumption that if the commerce clause is to apply to a state statute regulating the interstate transfer of a commodity, that commodity must be an "article of commerce." The term "commerce" implies that the commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value. An analysis of Nebraska case law and statutes demonstrates that Nebraska law has never considered ground water to be a market item freely transferable for value among private parties, and therefore not an article of commerce.

The first Nebraska case to consider the overlying landowner's proprietary interest in water under his land is *Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304 (1933). The *Olson* court specifically rejected the "English rule" of rights in ground water, which recognizes absolute ownership of ground water in the overlying landowner.

Instead, the court adopted a slightly modified version of the more restrictive American rule of "reasonable use"; "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Id.* at 811, 248 N. W. at 308. The "pure" American rule, as stated by other authorities at the time, did not include the concept of sharing in times of shortage, and the *Olson* court's inclusion of that concept demonstrates its view that water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it.

The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. Neb. Const. art. XV, § 4. The decades of the 1930's and 1940's saw a quantum expansion in Nebraska of the use of ground water for irrigation. See Aiken, *Nebraska Ground Water Law and Administration*, 59 Neb. L. Rev. 917 (1980). Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957 when the Legislature declared "that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state." Neb. Rev. Stat. § 46-601 (Reissue

1978), and enacted statutes requiring well registration, well-spacing, and filling of abandoned wells. Neb. Rev. Stat. §§ 46-602 and 46-609 (Reissue 1978).

Transfer of ground water was considered by the Legislature in 1963. Neb. Rev. Stat. §§ 46-638 through 46-650 (Reissue 1978), enacted that year, and § 46-654, enacted in 1965, granted only to cities, villages, and municipal corporations the right to transport ground water out of its basin of origin for the purpose of supplying urban water needs. Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 799-800, 140 N. W. 2d 626, 636 (1966), confirmed that "[u]nderground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. . . . [I]t is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained." That court held that it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use." *Id.* at 801, 140 N. W. 2d at 637. The opinion clearly held that the Legislature has the power to determine public policy with regard to ground water and that it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Only a year after the decision in the *Metropolitan* case, the Legislature enacted the statute at issue in this

case, § 46-613.01, dealing with transfer of Nebraska ground water across state lines. The statute allows such transfers conditioned on the receipt of a permit from the director of the Department of Water Resources, who may grant the permit if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the receiving state "grants reciprocal rights" providing for transfer of ground water from that state into Nebraska.

The parties concede that Colorado forbids the transfer of ground water outside its borders and has no reciprocity provision in its statute. Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the *Olson* opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. Even where it appears that water itself is being marketed, as in municipal water supply arrangements, it is the value of the cost of distributing the water that is the basis of the rate structure and not the value of the water itself. See *K. S. B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N. J. 272, 381 A. 2d 774 (1977).

Appellants in their brief place great reliance on the case of *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W. D. Tex. 1966), *aff'd per curiam* 385 U. S. 35, 87 S. Ct.

240, 17 L. Ed 2d 34 (1966), which held that a Texas statute forbidding interstate transfers of water without legislative permission placed an unconstitutional burden on interstate commerce. However, at the time of *Altus*, Texas law treated ground water much differently than Nebraska. Texas recognized the absolute ownership of subterranean water in the overlying landowner. This is in sharp contrast to the narrowly circumscribed right of reasonable use only on the overlying land recognized in Nebraska. In addition, the *Altus* court noted that, in Texas, "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land outside the basin where produced, just as he could sell any other species of property." *Id.* at 840. In sum, said the *Altus* court, "the general law of the State of Texas . . . recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce . . ." *Id.* at 840. Since the only transfers prohibited by Texas law were interstate transfers, *Altus* found that Texas considered ground water to be an article of commerce, subject to the commands of the commerce clause of the U. S. Constitution. However, intrastate transfers of ground water in Nebraska are permitted only under carefully prescribed conditions and do not resemble a free-market setting. Ground water use is not an unlimited private property right in Nebraska law. The decision in *Altus* is not controlling. Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

Since the *Altus* case was affirmed without opinion by the U. S. Supreme Court, we must assume that the high

court had no quarrel with the District Court's application of the law to the particular facts of *Altus*. However, we need not and do not assume, as appellants would have us do, that *Altus* "overruled *sub silentio*" the 70-year-old holding in *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), that a state may, under its police power, forbid or condition the interstate transfer of its water resources without running afoul of the commerce clause. The *Hudson* case upheld the constitutionality of a New Jersey statute prohibiting the transfer of New Jersey surface water out of the state. The court noted that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States," and emphasized that the state as "quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 355-57.

There have been other U. S. Supreme Court cases limiting the rights of individual states to put conditions on the interstate transfer of natural resources other than water, such as natural gas and minnows. *Penna v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Oklahoma v. Kansas Nat. Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Hughes v. Oklahoma*, 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). However, we note that the natural resources dealt with in those cases have historically been market items, reducible to private possession and freely exchangeable for value. This has

never been the case with underground water in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. It is this caution which prevents us from holding that Nebraska ground water is an article of commerce. Because the ground water in this case is not an article of commerce, the commerce clause considerations do not apply to the Nebraska statute at issue here.

Appellants also urge that § 46-613.01 violates the due process provisions of the fifth and fourteenth amendments to the Constitution of the United States, which prohibit the United States or an individual state from depriving an individual of life, liberty, or property without due process of law. Although the arguments in the "due process" section of appellants' brief are actually equal protection arguments, we note that conditioning a landowner's right to transfer ground water either within or without Nebraska does not deprive him of a property right, since, under Nebraska common law, ground water may not be transferred off the overlying Nebraska land at all unless the public, owners of the water, grant that right. Not being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property by § 46-613.01.

Nor does the reciprocity provision of § 46-613.01 violate constitutional guarantees of due process, as appellants claim, by delegating legislative authority to the legislature of another state. The Nebraska Legislature

has exercised its legislative authority by determining the public policy of the state with regard to ground water and enacting that determination into law. It has not delegated to any other state's legislature the right to determine Nebraska public policy. The reciprocity provision is merely one of several conditions to be satisfied before a permit to transport water out of state may be granted. As stated in *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N. W. 451, 457 (1940): "The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

In *State v. Padley*, 195 Neb. 358, 237 N. W. 2d 883 (1976), the statute at issue set a 55-mile-per-hour speed limit on the portion of Interstate 80 crossing Nebraska, but declared that when the President terminates the Emergency Highway Energy Conservation Act such speed limit will revert to 75 miles per hour. The *Padley* court held that: "In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency." *Id.* at 360, 237 N. W. 2d at 885. That court also stated that the rule set out in *Lennox* "is a well-recognized rule of law." *Id.* at 360, 237 N. W. 2d at 885. The granting of a permit to transport water for irrigation out of state is contingent upon, among other things, the receiving state granting its landowners the same right. Each state is free to determine its own public

policy with regard to ground water transfers and to condition the right to transfer on one or more contingencies. Thus, there has been no unconstitutional delegation of legislative power by the Nebraska Legislature.

Appellants finally argue that § 46-613.01 violates the equal protection clause of the fourteenth amendment to the U. S. Constitution by virtue of an unreasonable classification. The class upon which § 46-613.01 operates consists of those persons wishing to transport Nebraska ground water out of state for irrigation purposes. It is plain from the language of the statute that the classification is reasonable. It is related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the class. Any person wishing to transport ground water out of state for irrigation purposes must apply for a permit to do so and the director of the Nebraska Department of Water Resources is to use the same guidelines in every instance in determining whether or not the permit may issue. That the statute does not apply to irrigators who do not wish to transport ground water out of state hardly makes it violative of equal protection.

The judgment of the District Court is affirmed.

Affirmed.

Krivosha, C. J., concurring in part, and in part dissenting.

While I generally concur with the majority's conclusion that establishing legislative criteria to control the transfer of water from the State of Nebraska to an ad-

joining state is not a violation of the commerce clause of the U. S. Constitution, I must respectfully dissent from that portion of the majority's opinion which holds that the statutory prohibition against the issuance of the permit, if the adjoining state does not grant reciprocity, is a constitutionally valid act of the Legislature. I believe that that portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which prohibits the Director of Water Resources from issuing a permit solely on the basis that the adjoining state does not grant reciprocity is an unreasonable classification and violates both the Constitution of the United States and the Constitution of the State of Nebraska.

Were the statute in question to provide that no person, firm, city, village, municipal corporation, or any other entity, including a citizen of the State of Nebraska, could use water from this state on land owned by such entity in both this state and an adjoining state unless and until the Director of Water Resources found that the water request was reasonable, was not contrary to the conservation and use of ground water, and was not otherwise detrimental to the public welfare, I would have no difficulty with the statute. But the statute as it currently exists provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in furtherance of the conservation and use of ground water in this state, and that it is not otherwise detrimental to the public welfare, but in fact is beneficial to the public welfare, he, nevertheless, cannot issue such permit, solely on the basis that the adjoining state does not permit en-

tities, including its own citizens, to transport water into this state.

The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state solely on the basis that the adjoining state would not reciprocate. If one were to extend this statute to its logical conclusion, one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was imminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity. It occurs to me that what this statute attempts to do is to absoluely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control.

To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits reciprocity, through it may not have water which can be transferred, while denying that privilege to other citizens of this state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition at a particular moment or its need, strikes me as being a violation of Neb. Const. art. III, § 18, and art. I, § 3, and the fifth and fourteenth amendments to the U. S. Constitution. I would have struck down that portion of § 46-613.01 which denies authority to the director if the adjoining state does not otherwise grant reciprocity.

Motion to Dismiss or Affirm

81-613

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FILED
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CLERK

NO. .....

In The

Supreme Court of the United States

October Term, 1981

JOY SPORHASE and DELMER MOSS, Individually and as Representatives of Sporhase and Moss,

Appellants,

vs.

STATE OF NEBRASKA ex rel.
Paul L. Douglas, Attorney General,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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MOTION

May it please the Court:

Appellee moves that the appeal herein taken be dismissed pursuant to Supreme Court Rule 16.1 (b) on the ground that said appeal does not present a substantial federal question.

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NO. .....

In The

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JOY SPORHASE and DELMER MOSS, Individually and as Representatives of Sporhase and Moss,

Appellants,

vs.

STATE OF NEBRASKA ex rel.
Paul L. Douglas, Attorney General,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM AND BRIEF IN SUPPORT THEREOF

OPINION BELOW

This is an appeal from a decision of the Supreme Court of the State of Nebraska rejecting appellant's contention that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) unconstitutionally burdens interstate commerce and denies the appellant the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF JURISDICTION

The jurisdictinal requisites are adequately set forth in the appellant's jurisdictional statement.

STATEMENT OF THE CASE

Neb. Rev. Stat. § 46-613.01 (Reissue 1978) provides that any person or entity intending to withdraw ground water from any well in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for permit to do so. For the permit to be issued, the Director of Water Resources must find: (1) that the withdrawal of ground water requested is reasonable; (2) the withdrawal of the ground water is not contrary to the conservation and use of ground water; and (3) the withdrawal of ground water is not otherwise detrimental to the public welfare; and (4) he must also be satisfied that the state into which the water is to be transported, grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska. If all of these findings are in the affirmative, the Director of the Department of Water Resources must grant the permit.

The State of Nebraska through its Attorney General Paul L. Douglas, initiated this action in the Nebraska courts to enjoin the appellants from transporting ground water pumped from a well located in the State of Nebraska into the State of Colorado, until acquiring a permit to do so pursuant to Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The appellants have not applied for nor obtained a permit pursuant to Neb. Rev. Stat. § 46-613.01 (Reissue 1978) as required. The Director of the Department of Water Resources has never denied the appellants such a permit. The well operated by the appellants is registered with the Department of Water Resources as required by Neb. Rev. Stat. § 46-602 (Supp. 1981) for each well in the State of Nebraska with the exception of wells used solely for domestic purposes.

The appellants assert that restrictions upon the transportation of ground water from one state to another is contrary to the Commerce Clause of the United States Constitution. They further assert that the restrictions enacted by the Nebraska Legislature found at Neb. Rev. Stat. § 46-613.01 (Reissue 1978) deny the appellants the equal protection of law and due process of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I.

The Nebraska statute does not impair the ability of Congress to regulate commerce among the various states by violating Article I, Section 8 of the United States Constitution.

Not every state statute which has an effect upon interstate commerce violates the constitutional provision giving Congress the power to regulate commerce among the several states. *Western and Southern Life Insurance Com-*

pany v. State Board of Equalization, — U. S. —, 101 S. Ct. 2070 (1981). *Minnesota v. Clover Leaf Creamery Company,* — U. S. —, 101 S. Ct. 715 (1981).

In *Western and Southern Life Insurance Company v. State Board of Equalization, supra,* this court recognized that Congress can exempt certain subjects from constitutional prohibitions against state regulation. The regulation of the use, allocation and distribution of a state's water resources is a matter which has been exempted by Congress and by the courts from federal pre-emption. *California v. United States,* 438 U. S. 645 (1978), Reclamation Act of 1902 at 32 Stat. 390, McCarran Amendment at 43 U. S. C. 666 (a). This court, in *California v. United States, supra* at 653, stated:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

Not only does the United States defer to the water law within each state, but it must also comply like every other citizen, with the state requirements for the use of that water which are not directly inconsistent with congressional directives. *Id.* at 678. The regulation of a state's water, like the insurance industry is generally exempt from the prohibtions of the Commerce Clause of the United States Constitution.

Additionally, water is not an article of commerce as defined by the law of the State of Nebraska. *State ex rel. Paul L. Douglas Attorney General v. Joyce Sporhase and*

Delmer Moss, 208 Neb. 703, 709, 305 N. W. 2d 614, 618 (1981). The Nebraska Supreme Court stated:

> Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the [*Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304 (1933)] opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.

208 Neb. at 707-708, 305 N. W. 2d at 618. Since the Nebraska ground water is not an article of commerce, it is not subject to the strictures of the Commerce Clause of the United States Constitution.

Even if the strictures of the Commerce Clause of the United States Constitution applied, the burden imposed by this statute upon commerce between the states is slight if not nonexistent. In determining the impact of a state statute upon interstate commerce, this court will look at the nature of the local interest, and whether the goals being promoted by the statute could be achieved as well with a lesser impact on interstate activities. *Minnesota v. Clover Leaf Creamery Company, supra*, 101 S. Ct. at 728 (1981). The rule regarding the criteria for determining the validity of state statutes affecting interstate commerce was stated in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. (Citations omitted.)

There is no question that preservation and conservation of a state's natural resources is a legitimate state concern. *Minnesota v. Clover Leaf Creamery Company, supra,* 101 S. Ct. at 727. The statute regulates evenhandedly residents as well as nonresidents of the state. All persons who desire to export water from the state must obtain the required permit and satisfy the same requirements. The effects upon interstate commerce are at the most incidental. There is no interstate commerce in water at the present time. It is not an article or a product. It is a unique natural element essential to every form of life itself, reusable again and again. The state's interest in its conservation is even more substantial than the interest of the State of Minnesota in *Minnesota v. Clover Leaf Creamery Company, supra.* 101 S. Ct. at 729. There are no alternatives which are less burdensome and achieve the same purpose. The state's interests are conservation of the water for use and furtherance of publicly approved activities. No other statutory scheme could achieve this purpose as well.

This case should be decided on the basis of *Hudson County Water Company v. McCarter,* 209 U. S. 349 (1908).

In that case, this court affirmed an injunction by the New Jersey state courts prohibiting the transportation of fresh water from the State of New Jersey to the State of New York on the basis of a state statute which read: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." This court found no violation of the Commerce Clause of the United States Constitution. The appellants argue that this case has no application and that *City of Altus, Oklahoma v. Carr,* 255 F. Supp. 828, *cert. denied* 385 U. S. 35 (1967) controls the case at bar. The *Altus* case has no application to our situation. It was based upon the finding that water was an article of commerce within the State of Texas, relying upon a Texas statute recognizing private ownership of water. Nebraska's law is different.

The Nebraska statute, Neb. Rev. Stat. § 46-613.01 (Reissue 1978) is consistent with Commerce Clause of the United States Constitution.

II.

The Nebraska statute does not deprive the appellants of equal protection of the law protected by the Fourteenth Amendment of the United States Constitution.

Evaluation of a challenge to a state statute upon the grounds of equal protection must address two questions:

(1) Does the challenged legislation have a legitimate purpose?

(2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Minnesota v. Clover Leaf Creamery Company, — U. S. —, 101 S. Ct. 715 (1981). The purposes articulated by the Legislature will be presumed to be the actual purposes of the statute unless an examination of the circumstances forces the court to conclude that they could not have been the goal of the Legislature. *Minnesota v. Clover Leaf Creamery Company, supra*, 101 S. Ct. at 723, footnote 7. In evaluating whether it was reasonable for lawmakers to believe that the use of a challenged classification would promote the legitimate state purposes, "challengers must prove that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker." *Minnesota v. Clover Leaf Creamery Company, supra*, 101 S. Ct. at 724. The challengers cannot prevail so long as it is evident from all considerations known to the Legislature, and those of which this court may take judicial notice, that the question was at least debatable. *Western and Southern Life Insurance Company v. State Board of Equalization, supra*, 101 S. Ct. at 2086. Equal protection is satisfied if this court concludes that the Legislature rationally could have believed that the statute could promote its objective.

The Nebraska Legislature when enacting LB 887, in 1967, stated its purpose in its finding that: "The Legislature finds, recognizes and declares that the conservation of ground water and the beneficial use thereof are essential to the well-being of this state." Neb. Rev. Stat. § 46-601 (Reissue 1978). In 1969, when the Act herein was

amended by LB 1357, the Legislature made the additional statement: "The Legislature hereby recognizes and declares that it is essential to the health and welfare of the people of the State of Nebraska to conserve, protect, develop, and manage the natural resources of this state." The natural resources addressed in LB 1357 were soil and water.

Conservation and beneficial use of ground water as a natural resource for the future generations was the objective of the Nebraska Legislature when enacting the challenged statute found at Neb. Rev. Stat. § 46-613.01 (Reissue 1978). This objective is a legitimate state legislative concern.

Nebraska manages its ground water by requiring beneficial use of that water and establishing a system of preferences of use for areas in times of shortage. Article XV, section 6 of the Nebraska Constitution. The Legislature has enacted statutes providing for the strict and comprehensive regulation of ground water where the preservation and conservation of the ground water is jeopardized. Neb. Rev. Stat. §§ 46-601 through 46-674 (Reissue 1978). Permits from the Director of the Department of Water Resources are required for a municipality to transport water for domestic use. Neb. Rev. Stat. § 46-638 (Supp. 1980). Permits are required from the Director of Water Resources for the appropriation and use of surface water. Neb. Rev. Stat. §§ 46-233, *et seq.* (Reissue 1978).

By all of its extensive legislation, the State of Nebraska has attempted to ensure that water is conserved and available to all people who need and want it while discouraging its waste. This management of the state's

water resource extends from the year 1889 when the Legislature first began recognizing appropriative rights and has been added to as the use and needs for the water demanded it.

The statute here can reasonably be believed to promote the purpose of conservation and beneficial use of the state's water. It requires the Director of the Department of Water Resources to evaluate an application for ground water transfer to find that it is reasonable, not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare. Neb. Rev. Stat. § 46-613.01 (Reissue 1978). There is no allegation by the appellants that it is unreasonable to believe that this will promote conservation and beneficial use of the water, the objectives of the act. The Department of Water Resources is also required to grant the permit "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska." Neb. Rev. Stat. § 46-613.01 (Reissue 1978). The Legislature could believe that this would conserve water and promote its beneficial use by ensuring the importing state makes the best use of the imported water as well as the water in that state. This court found in *Western and Southern Life Insurance Company v. State Board of Equalization, supra,* that the mere fact that a state seeks to promote its legitimate interests by influencing the policies of other states, does not render the legitimate purpose illegitimate. In that case, this court held that a retaliatory tax on insurance companies did not violate the Equal Protection Clause of the Constitution since the tax had a legitimate state purpose and it was reasonable to believe that the tax would

promote that purpose. The purpose of discouraging states from enacting discriminatory taxes is similar to the purpose of discouraging another state from enacting discriminatory water legislation. It is a fact in this case that Colorado does not permit water to be exported from that state to the State of Nebraska. Colorado Revised Statutes 37-90-136 (1973).

Appellants criticize the wisdom of the Nebraska statutes suggesting that the only requirement should be the reasonable use of the water without a reciprocity requirement. The wisdom of legislation is not the proper subject of an evaluation under the Equal Protection Clause. It is up to the legislatures not the courts to decide on the wisdom and utility of legislation. *Minnesota v. Clover Leaf Creamery Company, supra,* 101 S. Ct. at 726. If a question is debatable the act will be sustained. It is not the function of the courts to substitute their evaluation of the legislative facts for those of the Legislature. *Minnesota v. Clover Leaf Creamery Company, supra.*

The question of whether the legitimate state purposes are served by this legislation is clearly debatable and the Legislature could rationally have believed that the statute would accomplish its purposes. The statute satisfies the requirements of equal protection.

III.

The Nebraska statute does not violate the United States Constitution by depriving the appellants of liberty or property without compensation.

There is no substantial federal question that the Nebraska statute denies the appellants liberty or property without compensation.

As this court stated in *New Motor Vehicle Board v. Orrin W. Fox Company*, 439 U. S. 96 (1978): "'[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.' Zemel v. Rusk, 381 U. S. 1, 14, 14 L. Ed. 2d 179, 85 S. Ct. 1271 (1965)." *Id.* at 106. As recognized in this case, "[S]tates have power to legislate against what are found to be injurious practices in internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' Lincoln Union v. Northwestern Co., 335 U. S. 525, 536-537, 93 L. Ed. 212, 69 S. Ct. 251, 6 A. L. R. 2d 473 (1949)." *New Motor Vehicle Board v. Orrin W. Fox Company*, 439 U. S. at 107.

The question to be answered in the due process evaluation of a challenged statute is whether that statute bears a reasonable relation to the state's legitimate objectives. *Exxon Corporation v. Governor of Maryland*, 437 U. S. 117, 125 (1978).

The appellants complain that there is no rational connection between the restriction and the public interest to be protected, and that the statute operates as a taking without compensation.

We have discussed the relation of the statute to the purpose in the preceding argument. The objective is conservation and protection of the state's most valuable re-

source, water. This is a legitimate state objective. *Minnesota v. Clover Leaf Creamery Company, supra.* The courts will not act as a super legislature to weigh the wisdom of legislation. *Ferguson v. Skrupa*, 372 U. S. 726 (1963).

The appellants have not identified the alleged deprivation which they suffer. The states have always had and exercised the right to regulate the water within their borders. *California v. United States*, 438 U. S. 645 (1978). Nebraska has a comprehensive regulatory system for its ground and surface water, including the transportation within and without the borders of the state, and the use thereof. Neb. Rev. Stat. Chapter (Reissue 1978), *State ex rel. Paul L. Douglas Attorney General v. Joy Sporhase and Delmer Moss, supra.* Nebraska law does not permit private ownership of the water and water is not an article of commerce within Nebraska. *State of Nebraska ex rel. Paul L. Douglas Attorney General v. Joy Sporhase and Delmer Moss, supra.* The appellants cannot complain about the deprivation of liberty to do with the water that which they wish. They cannot complain of deprivation of property by restrictions upon their use of water. Neither of these rights has ever been recognized or protected within the State of Nebraska. The state's restrictions are clearly within the state's police powers and thus do not violate the due process provisions of the United States Constitution.

Even if the appellants had a property interest in the water or use thereof, the state's restrictions upon that use in accordance with a general scheme to regulate the water would not violate the due process provisions of the Constitution. *New Motor Vehicle Board v. Fox, supra.*

The Nebraska statutes can only be construed as placing a reasonable condition upon the right to transport water outside of the state. Similar conditions for use of property were approved by this court in *Hodel v. Indiana*, — U. S. —, 101 S. Ct. 2376 (1981).

The Nebraska statute does not deprive the appellants of due process of law by either the deprivation of liberty or property without compensation.

———o———

CONCLUSION

The appellants present no substantial federal question for review by this court. The Nebraska statute neither burdens interstate commerce, nor deprives the appellants of equal protection of the law nor of liberty or property without compensation. The appeal should be either dismissed or the decision of the Nebraska Supreme Court affirmed.

Respectfully submitted,

STATE OF NEBRASKA ex rel.
PAUL L. DOUGLAS, Attorney
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APPENDIX

A

Colorado Revised Statute Section 37-90-136 (1973) (EXHIBIT 14):

> Unlawful to divert water for application outside of state.—For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein.

Appellant's Brief

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No. 81-613

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PAUL L. DOUGLAS, ATTORNEY GENERAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which prohibits the interstate transportation of ground water, and is conditioned upon reciprocal legislation in the recipient states, imposes an undue and unreasonable burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Neb. Rev. Stat. § 46-613.01 (Reissue 1978) is unconstitutional and violates the due process and equal protection provisions of the United States Constitution.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported at 305 N. W. 2d 614, 208 Neb. 703 (1981). The opinion of the District Court for Chase County, Nebraska is not reported.

STATEMENT OF JURISDICTION

Joy Sporhase and Delmer Moss have appealed from a final judgment entered by the Supreme Court of Nebraska which enjoined the Appellants' efforts to transport ground water from a Nebraska well into the State of Colorado.

The opinion was entered on May 8, 1981. A motion for rehearing was entertained and denied on July 8, 1981. Notices of appeal were duly filed by the Appellants on September 17, 1981. The Jurisdictional Statement was filed with this Court on September 24, 1981. The Court noted probable jurisdiction on November 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

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STATUTORY PROVISIONS

Neb. Rev. Stat. § 46-613.01 (Reissue 1978) of the Nebraska Constitution provides as follows:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conversation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the ground

water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

Colo. Rev. Stat. Section 37-81-101 of the Colorado Constitution provides as follows:

> UNLAWFUL TO DIVERT WATER FOR APPLICATION OUTSIDE OF STATE. (1) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that such variation precludes the reasonable application of general law to situations and regions of such diversity. Accordingly, the general assembly hereby determines that, for the purpose of aiding and preserving unto the State of Colorado and all its citizens the use of all the water of the springs, lakes, ponds, creeks, rivers, streams and watercourses of this state, which waters do not increase with the growth of population and which are necessary for the health and prosperity of all the citizens of the State of Colorado, and for the growth, maintenance and general welfare of the state, it is unlawful for any person, corporation, or association to divert, carry or transport by ditches, canals, pipes, conduits, natural streams or watercourses the waters of any spring, reservoir, lake, pond, creek, river, stream or watercourses of this state into any other state for use therein. Where the same owner of agricultural land in Colorado owns agricultural land in the adjacent state that is contiguous with the agricultural land in Colorado, specific authorization of the General Assembly, on the advice of the state en-

gineer, is required to enable the water to be used in the adjacent state for agricultural purposes only. In deciding whether or not to authorize the diversion of water from Colorado into another state, the general assembly shall consider the willingness of said state to allow diversion of its water for use in Colorado.

(2) This section shall not apply to section 37-81-103.

Article 1 § 8, Cl. 3 of the United States Constitution provides as follows:

> To regulate commerce with foreign nations, and among the several States, and with Indian tribes.

The 5th Amendment to the U. S. Constitution provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 14th Amendment to the U. S. Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF CASE

1. Joy Sporhase and Delmer Moss, the Appellants, are residents of Phillips County, Colorado, and own adjacent and contiguous tracts of land in Chase County, Nebraska, and in Phillips County, Colorado.

2. A valid irrigation well physically located on the Nebraska tract is used for irrigating crops on both the Nebraska and Colorado tracts of land.

3. This particular well was registered with and approved by the Department of Water Resources of the State of Nebraska by Appellants' predecessors in title on January 18, 1971. The Nebraska Well Registration Number is G-33893.

4. Sporhase and Moss purchased the real estate involved at an auction in February of 1972 and expended approximately $43,500.00 to develop the irrigation system on the property.

5. On September 21, 1976, the Nebraska Department of Water Resources sent the Appellants a letter which informed them that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) prohibited the irrigation of lands in Colorado with water from a Nebraska well. The Department's letter summarily determined that the Appellants were in viola-

tion of the statute and that litigation would follow if the Appellants continued to irrigate their Colorado land.

6. The Petition initiating this action was filed by Paul L. Douglas, Attorney General of the State of Nebraska, on September 30, 1977, against Joy Sporhase and Delmer Moss, individually and as representatives of Sporhase and Moss, a family partnership, requesting that the District Court of Chase County, Nebraska, grant a permanent injunction restraining the Appellants from transporting ground water pumped from a well located in the State of Nebraska into the State of Colorado.

7. Sporhase and Moss answered on June 5, 1978, claiming eight (8) affirmative defenses regarding the transportation of ground water from their well in Nebraska into Colorado. Their answer contained the constitutional arguments presented before this Court.

8. A pre-trial conference was held on September 8, 1978, limiting the issues to be determined at trial to the pleadings and the evidence presented.

9. The issues tried by the District Court were:

(1) Whether the Appellants were required to obtain a permit to transport ground water out of Nebraska as required by Neb. Rev. Stat. § 46-613.01 (Reissue 1978);

(2) Whether Neb. Rev. Stat. § 46-613.01 (Reissue 1978) was unconstitutional.

10. A trial was had before the District Court of Chase County, Nebraska on January 12, 1979. On September 17, 1979, District Judge Jack H. Hendrix filed a Memorandum Opinion which required Sporhase and Moss

to obtain a permit to transport ground water out of Nebraska. The District Court's opinion also ruled that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) was constitutional.

11. Sporhase and Moss filed a motion for a new trial and motion for order to stay the injunction on December 26, 1979.

12. On December 23, 1980, the District Court overruled the motion of Sporhase and Moss for a new trial and sustained their motion for an order to stay the injunction.

13. Sporhase and Moss then appealed to the Supreme Court of Nebraska. In their brief to the Nebraska Supreme Court, the Appellants reiterated the claim that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) was unconstitutional.

14. On May 8, 1981, the Nebraska Supreme Court filed its opinion which considered and expressly rejected the constitutional claims made by the Appellants, thereby sustaining the Order of the District Court.

15. Sporhase and Moss filed a motion for rehearing on May 20, 1981, which was overruled by the Nebraska Supreme Court on July 8, 1981.

16. Their claims thus considered and dismissed, Sporhase and Moss perfected an appeal to the United States Supreme Court. On September 17, 1981, they filed a notice of appeal to the United States Supreme Court. On September 24, 1981, the Appellants filed with this Court a Jurisdictional Statement and on November 30, 1981, probable jurisdiction was noted.

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SUMMARY OF ARGUMENT

The Nebraska Supreme Court in this case granted the relief sought by the State of Nebraska by enjoining the Appellants, Sporhase and Moss, from transporting ground water located in Chase County, Nebraska into Colorado without a permit. This holding ignores the clear meaning of case law which limits a state's right to control the exportation of its natural resources, particularly water.

The decision by the Nebraska Supreme Court cannot be reconciled with the holding in *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W. D. Tex. 1966), affirmed per curiam 385 U. S. 35 (1967), in which the Supreme Court issued a per curiam decision affirming the lower Court's holding that restrictions on the exportation of water violated the Commerce Clause of the United States Constitution. This Court's ruling in *Altus*, although nothing more than a one sentence affirmation of the lower Court, provided an authoritative voice for resolving future cases involving the exportation of water.

Sporhase and Moss contend that water is, in fact, an article of interstate commerce and that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) unreasonably effects interstate commerce by restricting its exportation. They also contend that the application of the statute effects interstate commerce since it will restrict the production of agricultural products which are moved in interstate commerce.

Our view of the law and facts of this case leads us to believe that while a state may legislate to protect the health of its citizens or to conserve its natural resources, the legislation must be a reasonable exercise of the police

power and cannot unduly burden the free flow of interstate commerce. However, Neb. Rev. Stat. § 46-613.01 (Reissue 1978) clearly fails to pass inspection on these two points. By including an unreasonable limitation which requires reciprocity in the recipient state, the statute absolutely prohibits the transportation of water. Clearly the reciprocity clause does not serve the interests of Nebraska in maintaining or conserving its water resources. According to the statute, before a permit is allowed or denied a determination must be made to find if the withdrawal of water is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare. In this case there is no evidence that such a determination was made. Sporhase and Moss may not transport ground water simply because Colorado has no reciprocity clause. Thus, even if the transfer of ground water is reasonable, not contrary to the conservation and use of ground water, and is clearly beneficial to the public welfare, it could not be transferred. The reciprocity clause thus disserves rather than upholds Nebraska objectives.

Neb. Rev. Stat. § 46-613.01 (Reissue 1978) also violates the rights of the Appellants since it unreasonably acts upon citizens of Nebraska who desire to transport water across state lines while doing little, as discussed above, to further legitimate state interests.

ARGUMENT

I.

Neb. Rev. Stat. § 46-613.01 (Reissue 1978) violates the Commerce Clause of the United States Constitution.

The ruling by the Nebraska Supreme Court, which held that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) did not violate the Commerce Clause of the United States Constitution, is an erroneous analysis of applicable law and the facts of this case. First of all, ground water should be considered an article of interstate commerce. Secondly, in this case, the application of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) results in an unreasonable and undue burden on interstate commerce.

In the context of this case, ground water should be considered an article of interstate commerce. The ground water is drawn from the Ogallala Aquifer which extends through the central portion of the United States, and the flow of which is generally towards the east from Colorado to Nebraska. The ground water pumped from the well is applied to agricultural products and much of this water percolates back into the ground. Ground water is simply part of the hydrologic cycle. In *Metropolitan Utilities District v. Merritt Beach Company*, 173 Neb. 783, 140 N. W. 2d 626, 636 (1966), the Nebraska Supreme Court recognized this scientific fact:

> Underground waters, whether they are percolating waters or underground streams, are part of the waters refered to in the Constitution as a natural want. Such waters are as much a part of the hydrologic cycle as the flow of water in a stream or river.

The right to appropriate and transfer underground water was also discussed in *Metropolitan Utilities District*, 140 N. W. 2d at 637. The Court held that the Metropolitan Utilities District could drill wells on one piece of land and transport the water to other locations for sale to customers. Therefore, while there may be limitations

upon the use of ground water in Nebraska, it is obvious that it is an item which can be moved from one area to another to serve the citizens of Nebraska.

Just as the State of Nebraska has shown that ground water is capable of being transported and sold by its decision in *Metropolitan Utilities District, supra,* the ruling in *City of Altus, Oklahoma v. Carr,* 255 F. Supp. 828 (W. D. Tex.), affirmed per curiam 385 U. S. 35 (1967), offers insight into the question of whether ground water can be considered an article of interstate commerce. In *Altus* the Supreme Court there affirmed per curiam, a Federal District Court decision that held a Texas statute, which restricted the transportation of ground water from Texas to consumers in Oklahoma, was in violation of the Commerce Clause.

In *Altus,* the city of Altus, Oklahoma, facing a severe water shortage, began to develop sources of water to meet its future needs. The city soon discovered a sufficient source of water in Texas but before any could be exported the Texas Legislature enacted a bill which read:

> No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the state unless the same be specifically authorized by an act of the Texas Legislature, and thereafter as provided by it.

This statute was declared to be an unconstitutional restriction on interstate commerce. It is our contention that the case at bar falls within the scope of *Altus.*

The State of Texas urged that the statute was not a burden or restriction on interstate commerce for two

reasons. First, Texas argued that the purpose and intent of the statute was to "conserve and protect the water resources of the state by regulating the withdrawal of water from underground sources." Secondly, Texas urged that "since the statute here in question operates on and regulates underground water, which is not the subject of absolute ownership, it does not affect a substance which is the subject of commerce." Obviously, both arguments were rejected by the Court.

The State of Nebraska has raised the same arguments in defense of Neb. Rev. Stat. § 46-613.01 (Reissue 1978). However, we regard *Altus* as a reliable basis for the answer to these questions and contend there is no reason or principle which would dictate a different result in the present case.

The State of Nebraska believes that *Altus* has no applicability to the present case since laws regarding the use and ownership of water are somewhat different in the two cases. We believe this difference to be insignificant. The *Altus* case involved Texas water laws which follow the English Rule of absolute ownership. Under this legal theory, a landowner owns everything above and below his land. Consequently, landowners have the right to withdraw any quantity of water they desire. Their water may be wasted, sold and used without regard to drainage on adjacent lands. *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S. W. 2d 798 (1955). However, it should be obvious that under this theory a landowner does not really own the ground water under his land since he cannot prevent his neighbor from lowering his water level through waste or otherwise.

Nebraska's law on water rights seems to be a mixture of the American Rule, which is the reasonable use doctrine, and the doctrine of Correlative Rights. *Olson v. City of Wahoo,* 124 Neb. 702, 248 N. W. 304 (1933). Under this theory there are no limitations on the use of ground water as long as it is reasonably and beneficially used on overlying land. However, if the water supply is insufficient for all overlying landowners, each is entitled to a reasonable portion of the whole. *Harnsberger, Oeltjen & Fisher, Groundwater: From Windmills to Comprehensive Public Management,* 52 Neb. L. Rev. 179, 205 (1973). In theory, Nebraska's laws on water rights are more restrictive than the Texas laws involved in *Altus.* In practice, however, there appears to be little difference. While under the absolute theory a landowner can waste water and do with it as he pleases, it appears that waste or use on non-overlying lands may also occur under the reasonable use theory unless and until another landowner's rights are interfered with. *Canada v. City of Shawnee,* 179 Okla. 53, 64 P. 2d 694 (1937). Therefore, it seems that a landowner may withdraw groundwater for sale unless the adjoining landowner is deprived of the water needed for the beneficial use of his land. It appears that the rights of overlying landowners to use ground water are nearly equal under the English and American rules. As long as the use is reasonable or it doesn't injure an adjacent landowner, a landowner under the reasonable use doctrine may do as he wishes with the water.

It is respectfully suggested that the differences in the legal theories of water rights do not provide assistance and have little relevance in determining whether water is an article of interstate commerce. In all states one

merely has the right to use water and this right of use is clearly a property right. *Sax, Water Law*, p. 2, 1965; *United States v. Willow River Power Co.*, 324 U.S. 499 (1945). However, as discussed *supra*, no water right is as sacrosanct as an absolute ownership in land.

Based upon the arguments above, it appears that water, like any other species of property, may be reduced to possession and used. The fact that water uses may be limited to some degree, should not preclude it from being considered an article of interstate commerce. Nor should an item be exempted from the protections of the Commerce Clause simply because it is an important resource. While the State of Nebraska is operating under these erroneous presumptions, Sporhase and Moss believe that water should be treated no differently than any other personal or property right which is conditioned by a reasonable use requirement. In these days of increased regulation, it seems that very few items could be considered articles of interstate commerce, if regulations and limitations on use served to disqualify the item from such consideration.

While a state is justified in preventing the waste of its natural resources and may enact proper legislation to do so, states do not have an absolute power to restrict the exportation of its natural resources, or articles it claims to own, without interfering with the Commerce Clause. A review of the United States Supreme Court cases shows that natural resources have been recognized as articles of interstate commerce, thereby limiting the ability of states to regulate their movement between the states. *Hughes v. Oklahoma*, 441 U. S. 322 (1979). In *Pennsylvania v. West Virginia*, 262 U. S. 553, 596 (1923), the Supreme Court stated:

> "The question is an important one; for what one state may do others may, and there are ten (10) states from which natural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used."

Clearly, states will no longer be allowed to confine their resources and the resulting benefits to their people whenever such confinement impedes interstate commerce. *Baldwin v. Fish and Game Commission of Montana*, 436 U. S. 371 (1978). This rationale was also used in *West v. Kansas Natural Gas Company*, 221 U. S. 229 (1910), in which the State of Oklahoma urged its right to conserve the natural resources of the state for use by its own citizens, stressing the limited supply and the absence of alternative sources within the state. Nevertheless, the Court rejected this argument:

> "If the states have such power, a singular situation might result. Pennsylvania might keep its coal, and the Northwest its timber, and the mining states their minerals, and why may not the products of the field be brought within that principle?"

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), Judge Cardoza stated that the Commerce Clause "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." Historically, the Supreme Court has desired cooperation among the states and has viewed the Commerce Clause as an avenue for avoiding any balkanization in the realm of commerce which, of course, would insure economic inefficiency and lower productivity.

That the statute effects interstate commerce can hardly be doubted. In *NLRB v. Jones and Laughlin Steel Corporation*, 301 U. S. 1 (1937), the United States Supreme Court held that any activity, either local or interstate, which by itself or in combination with other activities has a substantial economic effect upon interstate commerce is within the scope of the Commerce Clause and may not be unreasonably interfered with. The regulation of the use of water, certainly by itself, or in combination with other factors, will have an effect upon interstate commerce. The fact that the exportation of water is restricted certainly effects interstate commerce. Also, by denying water to Sporhase and Moss, the Nebraska statute will effectively stop the production of crops moved in interstate commerce, since water is an essential and critical need in the production of crops. And it is beyond dispute that the production of agricultural items will effect interstate commerce. *Maneja v. Waialua Agricultural Company*, 349 U. S. 254 (1955); *Wickard v. Filburn*, 317 U. S. 111 (1942); *H. P. Hood v. DuMond*, 336 U. S. 525 (1949). Without question, Courts in the heartland of America recognize the significance of agricultural products and the national and international markets to which they are sent. *Cape Co. v. Wiebe*, 196 Neb. 204, 241 N. W. 2d 830 (1976).

In *Wickard*, the Supreme Court applied the test used in *NLRB*, *supra*, and held that farm production which is intended for consumption on the farm is subject to regulation, since it might have a substantial economic effect upon interstate commerce. If the economic effect upon interstate commerce is the true test of whether local activities can be regulated by Congress under the Commerce Clause, it seems that limiting the exportation of water and

subsequently the production of crops, are clearly within the Commerce Clause and, therefore, can only be regulated in a reasonable manner.

Equally without merit is any suggestion by the State of Nebraska that this case should be decided on the basis of *Hudson County Water Company v. McCarter*, 209 U. S. 349 (1908). In *Hudson* this Court held that New Jersey could prohibit the transportation of water into New York without violating the Commerce Clause.

We contend that the precedential nature of this antiquated case, if any, is fleeting and nebulous at best. While the case at bar deals with waters which are appropriated, *Hudson* involved riparian rights. Furthermore, the decision by Justice Holmes expressly limited the case when he stated in 209 U. S. at 356,

> "The problems of irrigation have no place here. Leaving them on one side. . . ."

While it may be correct to refer to *Hudson* as a landmark case of the past, in view of the limitations and antiquity, the emphasis by the State of Nebraska upon *Hudson* appears to be misplaced.

In summary, Sporhase and Moss urge this Court to accept the message in *Altus*: a statute prohibiting the use of water from an underground source for use in another state is an unconstitutional burden on interstate commerce. In our view, water is clearly an article of interstate commerce and it is also obvious that the regulation of water has a close and substantial effect upon interstate commerce, namely, the production of crops. For these reasons Sporhase and Moss argue that this case is within the scope of the Commerce Clause, and that any restric-

tions upon ground water and its uses must be reasonably and rationally connected to the state's objectives.

The Nebraska Supreme Court was also erroneous in concluding that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) is a valid exercise of the state's police power. Sporhase and Moss respectfully suggest that the statute places an undue burden and unconstitutional restraint upon interstate commerce.

A review of authoritative cases establishes that in order for legislation to be a valid exercise of the police power, it cannot be arbitrary or discriminatory but must have a rational and substantial relation to the objects sought. *Village of Euclid v. Ambler Realty Company*, 272 U. S. 365 (1926). Moreover, the Commerce Clause of the United States Constitution forbids a state from imposing unreasonable and undue burdens on interstate commerce. *Southern Pacific Company v. Arizona*, 325 U. S. 761 (1945); *Huron Portland Cement Company v. City of Detroit*, 326 U. S. 440 (1960).

In our view, Neb. Rev. Stat. § 46-613.01 (Reissue 1978), is not a reasonable exercise of the police power over local affairs. As mentioned above, the purpose of the Commerce Clause was to create a free flow of commerce between the states and to prevent "parochial legislative policies" such as the Nebraska statute. *H. P. Hood v. DuMond*, 336 U. S. 538. Obviously, states may pass legislation on matters of local concern, and it is true that not all legislation is unconstitutional simply because it effects interstate commerce in some manner. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (1939). If the legislation effects interstate commerce this

Court must attempt to balance the interest and accommodate the local and national needs. The approach taken by the Supreme Court in recent cases dealing with the constitutionality of statutes effecting interstate commerce is the rule applied in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . if a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.

The Nebraska statute regulating the exportation of water is concerned with a justifiable, legitimate state interest and at first glance appears to fall within the scope of the police power. While the state's interest in conserving natural resources is similar to the state's interest in protecting the health, welfare and safety of its citizens, no statute serving these interests may cause an undue burden on interstate commerce either as written or applied. According to the statute, the Director of Water Resources can make a determination to find if the transfer of ground water is reasonable, not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare. But no such study or determination was made. The only discovery which Nebraska attempted to make was whether the State of Colorado had a reciprocity clause and the decision to prevent the transfer

of ground water was based solely upon the lack of this reciprocity. However, as applied, the statute imposes an unreasonable burden on interstate commerce since it absolutely bars the exportation of water when adequate and less burdensome alternatives exist. It is our contention that the reciprocity requirement certainly has no rational relationship to the object sought and cannot be justified upon any factual basis when viewed in conjunction with existing alternative measures able to serve Nebraska's interests.

Sporhase and Moss believe the question concerning the constitutionality of Nebraska statute can be answered by reference to *Great Atlantic and Pacific Tea Company, Inc. v. Cottrell,* 424 U. S. 366 (1976), in which this Court struck down a Mississippi regulation excluding from Mississippi milk which was produced in other states unless that state accepted Mississippi milk on a reciprocal basis. It was held that under the Commerce Clause, Mississippi could not refuse to allow milk into Mississippi solely on the basis of reciprocity since the reciprocity requirement caused an undue burden on interstate commerce and could not be justified as a permissible exercise of the state's police powers in maintaining health standards.

While the Mississippi regulation included safeguards to insure that only wholesome milk would enter Mississippi, it also included a clause requiring reciprocity. The effect of reciprocity did not slip by the Court, which stated at 424 U. S. 375·

> Although not in terms an absolute and universal bar to sales of out of state milk, which was the effect of the Madison Ordinance, invalidated in Dean Milk, the barrier of the reciprocity clause to sales of out-of-

> state milk in Mississippi has in this case also "in practical effect exclude(d) from distribution in (Mississippi) wholesome milk produced . . . in (Louisiana).

At 424 U. S. 375, the court also discussed the argument by the State of Mississippi that the reciprocity clause helped achieve the state's goals:

> Mississippi's contention that the reciprocity clause serves its vital interests in maintaining the State's health standards borders on the frivolous. The clause clearly does not do so in the sense of furthering Mississippi's established milk quality standards.

The Court noted that states with lower milk standards than Mississippi's could get their milk admitted to Mississippi by entering into reciprocity agreements. However, a state with very high milk quality standards could not get its milk admitted to Mississippi unless it had such an agreement. Clearly, the reciprocity clause did nothing to further Mississippi's goal of protecting the health of its citizens.

The Court went on to say the Mississippi statute caused a situation where the "burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits, and that obvious alternatives existed for protecting the health of Mississippi's citizens."

In our view Nebraska's claim, similar to the one advanced by Mississippi, that the reciprocity clause serves the state's objectives by conserving and managing its water resources "borders on the frivolous." The clause clearly does nothing to enhance the vital interests of Nebraska. It is not hard to imagine the results which could occur when basing such a decision solely upon reciprocity. As Nebraska's Chief Justice Norman Krivosha pointed

out in his dissent, if "one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was eminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity." It is easy to envision a situation where water could be transported into a dry state which had reciprocity and which would never have the ability to export water back to Nebraska, while at the same time, no water could be given to a water-saturated state which could someday provide Nebraska with its water supply. Even if all the states surrounding Nebraska had reciprocity clauses that fact would not insure that Nebraska would ever receive a drop of water in return. The recipient state would not have to enter into a contract to replace each drop of water it received from Nebraska since that is not required. Only reciprocity is needed. In our view Nebraska could have attained its goals by making the determination called for in the statute. The statutory tests are less burdensome than a decision based solely upon reciprocity since reciprocity acts as an absolute bar and the decisions based upon the determinations called for in the statute would be made on a case-by-case basis and would truly reflect the interests of the State of Nebraska.

II.

Neb. Rev. Stat. § 46-613.01 (Reissue 1978) is unconstitutional and violates the Due Process and Equal Protection Clauses of the United States Constitution.

The concept of substantive due process provided in the Fourteenth Amendment is basically a test of the rea-

sonableness of a statute in relation to the government's power to enact such legislation. The primary purpose of this section of the Constitution is to protect the people of the United States from the arbitrary and unreasonable exercise of powers by state governments. It is our position that the Nebraska statute, with its unwieldy reciprocity clause, has no rational connection with the state's objective of managing and protecting Nebraska's water resources. The statute seems to be in conflict with no less an authority than the United States Supreme Court which has held that all legislative activity and any exercise of the police power must be limited by notions of reasonableness and require a substantial relationship between the legislation and the objectives sought to be achieved. *Village of Euclid v. Ambler Realty Company, supra.*

The classic statement of the rule in *Lawlor v. Steel,* 152 U. S. 133 (1894) is still valid:

> To justify the state in . . . interposing its authority in behalf of the public, it must appear first, that the interests of the public require such interference; and second, the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

The means used in Neb. Rev. Stat. § 46-613.01 (Reissue 1978) are not "reasonably necessary for the accomplishment" of the state's goals and are obviously "unduly oppressive upon individuals." The means used in this statute will not reasonably accomplish any expressed purpose, but will merely succeed in shutting off an irrigation well, thus causing Sporhase and Moss severe economic injury. The Appellants will no longer be able to produce crops or

irrigate their land and they will be denied the reasonable use of their land. Clearly the statute operates as a taking without compensation. *Arverne Bay Construction Co. v. Thatcher*, 287 N. Y. 222, 15 N. E. 2d 587 (1938).

The reciprocal portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) places the Appellants at the mercy of the lawmakers of another state by delegating the powers of the Nebraska Legislature to that state. While it may be legitimately argued that some so-called retaliatory or reciprocity statutes do not give other states a voice in determining what the law of the enacting state shall be, in this case, the statute clearly has that effect. The issue was correctly summarized by Chief Justice Norman Krivosha of the Nebraska Supreme Court in his dissent:

> But the statute as it currently exists, provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in the furtherance of the conservation and use of ground water in this state, and it is not otherwise detrimental to the public welfare, but is, in fact, beneficial to the public welfare, he, nevertheless, cannot issue a permit, *solely on the basis* that the adjoining state does not permit entities, including its own citizens, to transport water into the state. (Emphasis added.)
>
> The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state *solely on the basis* that the adjoining state would not reciprocate. (Emphasis added.)

> It occurs to me that what this statute attempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which the citizens of this state have no control. To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits reciprocity, though it may not have water, which can be transferred, while denying that privilege to other citizens of the state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition of a particular moment or its need, strikes me as being a violation of Nebraska Constitution Article III, § 18, and Article I, § 3, and the Fifth and Fourteenth Amendments to the United States Constitution.

The Chief Justice has not missed the practical effect of the reciprocal provisional: by rejecting a permit application, not because of its reasonableness, but due to a lack of reciprocity, the statute is, in effect, unreasonable. Furthermore, the problem is not simply reciprocal legislation. The problem is whether the State of Nebraska can prevent the use of water "*solely on the basis* that the adjoining state would reciprocate." (Emphasis added.)

The error in the reasoning of the State of Nebraska is that too much importance was placed on the state's objectives to be served by the statute and that the significance of the practical effects of the statute was largely ignored. Sporhase and Moss have been denied the right to transport water simply because Colorado does not have a reciprocity statute. This occurs without regard to the real and important considerations such as whether or not the transportation of ground water would be reasonable, not contrary to the conservation and use of Nebraska's

water resources and not otherwise detrimental to the public welfare.

While the statute requires the Director of the Department of Water Resources to make a determination to discover if the ground water transfer would be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, this is not done when reciprocity isn't offered. If the above evaluation was all that was required for the issuance or denial of a permit, the statute would achieve Nebraska's objectives in a reasonable, logical manner. However, in the case at bar, the permit was denied not because of a reasonable objective evaluation of the circumstances. It was denied simply because the recipient state, in this instance, Colorado, would not reciprocate.

In our view, it "borders on the frivolous" to suggest that the legislature could believe a decision based solely on reciprocity would have any connection with the state's objectives.

In reference to the assertion by Nebraska that Sporhase and Moss have suffered no deprivation, Sporhase and Moss suggest that they have been deprived in at least two instances. Art. I, § 21, of the Nebraska Constitution states that the property of no person shall be taken or damaged for public use without just compensation therefor. In our case it can certainly be argued that the regulation of ground water is damaging to the property values of Sporhase and Moss since the regulation will severely reduce the crop production and the value of the property involved. Furthermore, the assertions by the State of Nebraska that no property rights exist in ground water are certainly de-

batable. The fact that Nebraska allows damages for interference with existing wells and that it has established a preference system for ground water use, as set forth in Neb. Rev. Stat. § 46-613 (Reissue 1978) seems to confirm the existence of proprietary rights in ground water which is capable of being enforced through the judicial process.

Under the Equal Protection Clause of the Fourteenth Amendment and as an implicit guaranty of the Due Process Clause of the Fifth Amendment, any governmental acts which treat people in a dissimilar manner are unconstitutional. The United States Constitution requires that every state respect the equality of all persons to possess and enjoy property rights within its borders. Nebraska's disapproval of the laws of the State of Colorado cannot justify the hardship imposed upon individuals wishing to irrigate Colorado land. The discrimination caused by this statute is contrary to all notions of equality. While Nebraska has tried to show that the language of the statute creates a reasonable classification, the statute bears heavily only upon the irrigator who wants to use ground water in a state not offering reciprocity. As discussed above, reciprocity requirements are patently unreasonable and the statute singles out this irrigator without regard to the beneficial or conservation effects and without determining if it would be otherwise or detrimental to the public welfare of the state. Also, authority provides that the hindrance of the food production and business interests of Sporhase and Moss caused by this statute creates an adverse effect upon the public health and welfare and is, therefore, unconstitutional. *U. S. Brewers Association, Inc. v. State*, 192 Neb. 328, 220 N. W. 2d 544 (1974); *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192

Neb. 89, 219 N. W. 2d 214 (1974). It seems clear that the effect of this statute will definitely affect the Appellants' business interests and will hinder food production, thereby injuring the public welfare.

Great Atlantic and Pacific Tea Company, Inc. v. Hugh B. Cottrell, supra, which dealt with the reasonableness of a state's use of its police power, should be the harbinger of this Court's decision in the present case. As previously mentioned in the *Great Atlantic and Pacific Tea Company, Inc.* case, the Court stated that any contention that the reciprocity clause furthers the state's interests "borders on the frivolous." It appears the Court considered that aspect of the regulation to be unreasonable in the sense that it did nothing to serve the state's goals. It is equally clear that this reciprocity requirement in the Nebraska statute does nothing to serve Nebraska's interest.

Simply put, the Appellants contend that in order for a statute to be a valid exercise of the police power, the statute itself and any contingencies therein must be reasonable and advance the objectives of the legislation. This reciprocity clause meets neither of these criteria.

CONCLUSION

For the reasons stated, we respectfully urge this Court to reverse the decision of the Nebraska Supreme

Court and find that Neb. Rev. Stat. § 46-613.01 is unconstitutional.

Respectfully submitted,

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No. 81-613

In The

Supreme Court of the United States

October Term, 1981

JOY SPORHASE and DELMER MOSS,
Individually and as Representatives
of Sporhase and Moss,

Appellants,

vs.

STATE OF NEBRASKA ex rel. Paul L.
Douglas, Attorney General,

Appellee.

On Appeal from the Supreme Court of the State of Nebraska

BRIEF OF APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which requires a permit for the exportation of water from the state and using the consideration of reciprocity of the receiving state's laws, violates the Commerce Clause, Article I, Section 8 of the United States Constitution?

2. Whether the Congress has exempted the regulation of water from the application of the Commerce Clause of Article I, Section 8 of the United States Constitution and left this power to the states?

3. Whether Neb. Rev. Stat. § 46-613.01 (Reissue 1978) requiring a permit to export water conditioned upon reciprocity in the receiving state violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska is reported at 208 Neb. 703, 305 N. W. 2d 614 (1981) and is found in the Joint Appendix at page 113. The opinion of the District Court of Chase County, Nebraska, is not reported but is found in Joint Appendix at page 15.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. I, § 8.

> The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Nebraska Constitution, Art. XV.

> Sec. 4. Water a public necessity. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.
>
> Sec. 5. Use of water dedicated to people. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.
>
> Sec. 6. Right to divert unappropriated waters. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a su-

perior right without just compensation therefor to the inferior user.

Nebraska Statutes.

46-601. Ground water; declaration of policy. The Legislature finds, recognizes and declares that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state. Complete information as to the occurrence and the use of ground water in the state is essential to the development of a sound ground water policy. The registration of all wells, except wells used solely for domestic purposes, in this state should be required.

46-613.01. Ground water; transfer to adjoining state; Department of Water Resources; may authorize; reciprocity. Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

46-635. Ground water, defined. Ground water is that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.

Colorado Statute.

37-90-136 (1973) is found at Appendix A of Appellee's Motion to Dismiss Appeal.

STATEMENT OF THE CASE

Appellants own a tract of land located within the State of Nebraska. Upon this tract they have located an

irrigation well and pump (J.A. 48). They also own a tract of land in Colorado across the state line road from the Nebraska tract (J.A. 49, 112). Upon the Colorado tract of land they have installed a center pivot irrigation system. They pump the water from the well located on the Nebraska tract underneath the state line road in an underground pipe approximately one-quarter mile to the center pivot irrigation system (J.A. 49, 112).

The land in Nebraska upon which the well and the pump are located is within the boundaries of the Upper Republican Natural Resources District which has promulgated special rules and regulations requiring well permits, defining illegal wells, and specifically regulating ground water use (J.A. 91-109). The land upon which the well is located is within the boundaries of the Upper Republican Ground Water Control Area. The control area was created at the initiation of the Natural Resources District after hearings and investigations by the Director of the Department of Water Resources of the State of Nebraska pursuant to Neb. Rev. Stat. §§ 46-650 et seq. (J.A. 32-33). Rules and regulations approved for ground water control within this control area include the designation of "critical townships" where the ground water table has experienced a significant annual decline as determined by yearly ground water measurements (J.A. 61-62). The goal of the control area is the implementation of a "manageable rate of decline in the ground water table of one percent of the saturated thickness of the aquifer per year" (J.A. 67). Appellants' well is located within a critical township (J.A. 35). Any ground water user within the control area is required to install flow meters to measure the flow of water from his irrigation well and is allocated a certain amount of water for each acre of irrigated land per year which may be applied to his crops (J.A. 71-

79). Rules also set restrictions upon the spacing permitted between irrigation wells within the control area, and specifically within critical townships (J.A. 81-82). The purpose of these rules, and of the creation of the Upper Republican Natural Resources District, the Upper Republican Control Area, and the critical townships is to protect the water in this locality (Volume I, Bill of Exceptions, 54:18-55:4). A great deal of study and investigation went into the determination of critical townships within the control area (Volume I, Bill of Exceptions, 55:8-12).

The creation of the Ground Water Control Area by the Director of the Department of Water Resources was ordered only after a hearing at which professionals testified and presented evidence concerning the status of the ground water levels in the area (J.A. 56-60). As part of the evidence considered was a comprehensive mathematical model study of the aquifer system underlying the district as well as two scenarios addressing themselves to the historical developments and to projections of current and expected demands upon the aquifer system (J.A. 57). After consideration of this information, the Director found that the number of registered irrigation wells had increased by more than 550 percent during the past 20 years, and that ground water levels had experienced a continuous decline throughout a considerable portion of the National Resources District over the same period of time (J.A. 57). He determined that ground water development had been the cause of this decrease and that withdrawals from the ground water aquifer exceeded replenishment within the district (J.A. 57). Predictions included further lowering of the ground water levels would be expected, increases in surface water users, and conflicts among users of ground water (J.A. 58). Substantial economic hardships based upon the continued decline in ground water availability leading to a reduction in the

economic prosperity within the area were foreseen (J.A. 59). On this information, the Director found that the ground water supply was inadequate to meet present or reasonably foreseeable needs for beneficial use of the ground water supply in the future within the district (J.A. 59). He ordered the creation of the ground water control area to be established within the Upper Republican Natural Resources District setting its boundaries. He specifically required that individual permits for new wells exceeding a certain output would be required prior to their construction within the area (J.A. 60). Appellants' land lies within this area.

Any well constructed in the State of Nebraska is required to be registered according to Neb. Rev. Stat. § 46-602 (Supp. 1980). The purposes of registration of all wells within the state is to gather technical information about the hydrology of the area of the well and the uses of the water (J.A. 30-31). Well registration is a ministerial act of the Department of Water Resources. The information is technical in nature (J.A. 30). It is not an application but merely a registration of the existence of the well and the pertinent information pertaining to it. No determination is made regarding the use of the water from the well, whether it is reasonable or beneficial, or whether it is consistent with the conservation of the ground water (J.A. 40). After a well is registered, the information contained in the registration is distributed to departments and political subdivisions of the State of Nebraska for their use. These organizations include the University of Nebraska Conservation and Survey Division (responsible for the collection of geologic and hydrologic data), as well as the Upper Republican Natural Resources District (responsible for the regulation of ground water within this area), and the Nebraska Natural Resources Data Bank (J.A. 26).

The predecessors in interest of the land in Nebraska upon which this well is located, duly filed a registration of the well when it was constructed (J.A. 50-55). This registration was filed with the State of Nebraska on January 18, 1971 (J.A. 53). Neither the appellants nor their predecessors in interest ever applied for a permit to transfer ground water from Nebraska to Colorado in compliance with Neb. Rev. Stat. § 46-613.01 (J.A. 38). The Department of Water Resources has never issued a permit to the appellants nor their predecessors in title for the transport of ground water across State lines (J.A. 38). No determination was ever made that the appellants would be prohibited from the transportation of ground water from Nebraska into Colorado had they applied for such a permit (Volume I, Bill of Exceptions, 46:25-47:6). In consideration of an application to withdraw ground water from any well in Nebraska and transport it for use into an adjoining State, the Director of the Department of Water Resources would consider: (1) whether the withdrawal of ground water requested is reasonable; (2) whether the withdrawal of ground water is consistent with conservation and use of ground water; (3) whether the withdrawal would be otherwise detrimental to the public welfare; and (4) whether the State to which the water is to be transported grants reciprocal rights to transport water into Nebraska (Neb. Rev. Stat. § 46-613.01 (Reissue 1978); (J.A. 36). The information that is requested upon such a permit application includes the location of the well to be constructed for transportation, the location of the place of use of the ground water, the location of other users of ground water in the immediate vicinity, and the amount of water on an average daily basis that would be transported to the adjoining state (J.A. 36). The Department of Water Resources has re-

ceived no application for the transportation of ground water (Neb. Rev. Stat. § 46-613.01 (Reissue 1978)) pursuant to this statute, and has therefore made no determination whether the statutory requirements for issuance of the permit could be satisfied by appellants (Volume I, Bill of Exceptions, 38:3-16). This statute was enacted in 1967.

The Department of Water Resources upon receipt of a complaint addressed a letter to the appellants on September 21, 1976. Since they had no permit, it advised them that it appeared they were exporting water out of Nebraska into Colorado in violation of a state statute requiring a permit to do so, and that the Department intended to enforce this law against them the next irrigation season. The letter closed with the hope that the appellants would make alternative arrangements for the next growing season (Ex. 6; Volume II, Bill of Exceptions 45, 46).

SUMMARY OF ARGUMENT

Water is a unique commodity. It is essential to and the essence of life itself. Water is different than other natural resources such as oil, gas, fish and wildlife.

Water is treated differently in the law. Within the State of Nebraska the Constitution declares it to be "a public want" and is "dedicated to the people of the State for beneficial purposes. . . ." In Nebraska no right or title may be acquired to the water itself; any right to the water is a right of use. For irrigation, it must be applied to the overlying land, and it may not be traded or sold. In Nebraska water is not an article of commerce. Water is also treated specially in the law of this nation. Congress specifically has recognized in numerous Acts of Congress the right of the States to determine the law of water within their boundaries. And for good reason. The

availability and the demands for water will vary based upon the geography, climate, hydrology, and geology of the particular locale. States have more knowledge about their local conditions and their local needs and uses. Each State has developed an expertise and a system for dealing with water effectively. Entry of the Federal government into this area would only be confusing and chaotic. Congress has also recognized the preeminence of the States in the area of water control by its repeated ratification of inter-State compacts allocating surface waters on certain rivers and streams.

This court has recognized in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) that State restriction upon the export of water does not violate the Commerce Clause nor the Due Process or Equal Protection Clauses of the Constitution. The case of *City of Altus, Oklahoma v. Carr*, 225 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1967) does not change this precedent. The decision in that case is limited to its special circumstances including the recognition of water as an article of commerce subject to private ownership by Texas law, and the reliance by the City of Altus upon the Texas law before it was changed. Water in Nebraska may not be privately owned and is not an article of commerce. Therefore, water in Nebraska should not be subject to application of the Commerce Clause.

If water is subject to the Commerce Clause, Congressional action deferring to State controls of water should be viewed as an exemption by Congress of water from application of the Commerce Clause. By the Reclamation Act of 1902 and others, Congress has specifically deferred to State water law. This court recognized this deference in *California v. United States*, 438 U.S. 645, finding the "consistent thread of purposeful and con-

tinued deference to State water law by Congress." *Id.* at 653. Congressional approval of the inter-State compacts dealing with surface waters also exemplifies this deference.

Notwithstanding the special character of water, and its special treatment in the law and by Congress, if State legislation controlling and regulating ground water is subject to the Commerce Clause, Neb. Rev. Stat. § 46-613.01 (Reissue 1978) meets the test of validity. This statute was enacted to conserve ground water for future generations pursuant to a legislative study of ground water policies. The conservation and preservation and control of ground water is a legitimate State interest. This statute even-handedly affects all people irrespective of their place of residence. The statute serves the purpose of conserving ground water in each of the respective states and of promoting complementary ground water control policies. It prevents a race to the bottom of the aquifer which would result from unfettered inter-State ground water transfers. There is no reasonable alternative which would serve these purposes.

The conservation and control of ground water being a legitimate local concern, and the statute reasonably promoting that concern, Neb. Rev. Stat. § 46-613.01 (Reissue 1978) is a valid enactment under the Equal Protection Clause. The Legislature could reasonably believe that this statute would promote the purposes of conservation and beneficial use of the State's waters for future generations. The wisdom and utility of legislation is for the Legislatures and not the courts.

The Nebraska statute does not deprive appellants of due process of law. They, of course, are limited in how they may use the water underlying their land. Under Nebraska law, any water user is limited in the use of

water. It must be applied to the overlying land and used for beneficial purposes without waste. Appellants are not deprived of the use of their land nor of the water underlying it. They are merely restricted from the uses they desire. These restrictions are no more severe than those approved by this court in other cases respecting use of property. Appellants are not denied the right to due process of law.

ARGUMENT

I.

Water while within the boundaries of Nebraska is held by the state in a public trust for the use and benefit of its people, and therefore is not an article of commerce nor subject to the Commerce Clause of the United States Constitution while it is within its borders.

A. Congress has the power to regulate commerce.

Article I, Section 8 of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." This has been interpreted to grant Congress the power to regulate anything which moves or affects commerce among the various States. However, the grant of this power to Congress has been said to be "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock v. Alling,* 93 U.S. 99, 103; *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 443-444. Legislation which affects commerce in a great many ways has been enacted by the States and upheld by this court. The rule is, however, that "a State may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 444 (1960).

The question therefore becomes whether the regulation of water within a State is the regulation of an article of commerce or the regulation of an area "where uniformity of regulation is necessary." We think that the answer to both questions is in the negative.

B. The regulation of water is not an area where uniformity of regulation is necessary.

Water is a substance which is unique unto itself and does not fall within categories which have been established for other substances in the past. Justice Holmes writing for the court in *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 356 (1908) speaks of it as "one of the great foundations of public welfare and health . . . a great public good." The Nebraska Constitution states: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Article XV, Section 4 of the Nebraska Constitution. The legal treatment of water within the United States has varied from region to region across the nation depending upon the "varying physiographic and climatic regimes" in each region. *California v. United States,* 438 U.S. 645, 648 (1978). These differences in topography, geology, hydrology, and climate all "necessitated the recognition of legal distinctions corresponding to these differences." *California v. United States, Id.* Each State was permitted to establish its own system for the taking, appropriation, use and regulation of water when the water was in its boundaries. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 162-164 (1935); *California v. United States, supra* at 658.

The philosophy behind the deference by Congress to State water law was stated by Senator Clark of Wyoming in 1902 referring to the Reclamation Act of 1902 which

testimony is quoted in *California v. United States*, 438 U.S. 645, 667:

> "[I]t is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . ."

Water, being unique, is different from oil and natural gas, wildlife and game, and other natural resources. This is especially so in the State of Nebraska where water is held in public trust by the State for its people and not permitted to be privately owned. *State of Nebraska ex rel. Paul L. Douglas, Attorney General v. Sporhase and Moss*, 208 Neb. 703, 305 N.W. 2d 614 (1981).[1] Nothing else is so essential to life itself. Nothing else is restricted from private ownership. Nothing else is held by the State for use by the public as a whole. Any analysis which treats water the same as any other natural resource, ignores its unique character and its unique treatment in the law.

C. Water while in Nebraska is held by the State of Nebraska in public trust for its people and is not subject to commercial trade.

In determining whether a substance is an article of interstate commerce, this court, in the past, has looked to state law for guidance to see whether the substance is an article of *intra*-State commerce. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1910); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *City of Altus v. Carr*, 225 F. Supp. 828 (W.D. Tex. 1966) *aff'd per curiam*, 385 U.S. 35 (1967); *In re Rahrer*, 140 U.S. 545 (1890); *Bowan v. Chicago and N.W. Ry. Co.*, 125 U.S. 465 (1887).

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1 See also, Hutchins, *Water Rights in the Nineteen Western States*, 5 USDA (1971).

The law of Nebraska has been clearly defined by the Nebraska Supreme Court in the instant case. *State of Nebraska ex rel. Paul L. Douglas, Attorney General v. Sporhase and Moss*, 208 Neb. 703, 305 N. W. 2d 614 (1981) (J.A. 113). Our Supreme Court said:

> Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the *Olson* opinion [*Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304 (1933)] demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.

305 N. W. 2d at 618 (J.A. 119). The court went on to say:

> Ground water use is not an unlimited private property right in Nebraska law. . . . Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

305 N. W. 2d at 618 (J.A. 120).

The Nebraska Supreme Court relied upon its previous decision in *Olson v. City of Wahoo, supra*, declaring a landowner's rights to ground water underneath his land. It differentiated between the "English rule" of rights in ground water which recognizes absolute ownership of ground water by the overlying landowner, as is the case in the State of Texas, from the approach adopted by the State of Nebraska which it called "a slightly modified version" of the more restrictive American rule of "reasonable use." It defined this as follows:

> "The American rule is that the owner of land is entitled to appropriate subterranean waters found under

> his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. . . ." [*Olson v. City of Wahoo*, 248 N. W. 304, 308].

305 N. W. 2d at 617 (J.A. 117). It gave as its rationale that "water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it." 305 N. W. 2d at 617 (J.A. 117).

The court recognized that although municipal water supply systems seem to charge for the water that they provide through their distribution systems, the basis of the rate structure is not the value of the water itself but the cost of distributing that water to its customers within the state. 305 N. W. 2d at 618 (J.A. 119). The court also recognized that although intrastate transfers of ground water are permitted, they are only permitted under certain prescribed conditions which do not resemble a free market setting. 305 N. W. 2d at 618 (J.A. 120). The primary example is transfers of water for municipal or rural domestic and drinking water purposes (Neb. Rev. Stat. §§ 46-638 et seq. (1980 Supp.)). In a later unrelated case, entitled *In re Water Appropriation Numbers 442A, 461, 462, and 485*, 210 Neb. 161, 313 N. W. 2d 271 (1981), the Nebraska Supreme Court reaffirmed its earlier decisions which permitted the forfeiture of appropriation rights for failure to make beneficial use of the appropriated waters for three years under the nonuser's statutes, on the basis that the appropriation right is subject to such reasonable regulation subsequently adopted by the Legislature by virtue of the police power of the state. This reaffirms the Supreme Court's finding in the instant case that the

right to use water within the State is subject to legislative limitation.

It is evident that water in the State of Nebraska is held in public trust, not subject to private ownership, subject to any limitations placed upon it by the State, available for use but not ownership, and is not an article of commerce to be bought, sold or traded.

Indeed, the use which a landowner makes of the subterranean waters found under his land is limited to the reasonable and beneficial application of that water on the overlying lands. *Prather v. Eisenmann,* 200 Neb. 1, 261 N.W.2d 766 (1978). *State of Nebraska v. Sporhase and Moss, supra* (J.A. 120).

Water in Nebraska is not an article of commerce under Nebraska law.

D. The case of City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), aff'd per curiam, 385 U.S. 35 (1967) has no application to this case.

The appellants rely upon the case of *City of Altus, Oklahoma v. Carr,* 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd per curiam,* 385 U.S. 35 (1967), a case decided by the District Court of the Western District of Texas and affirmed per curiam, without opinion by this court. The facts in this case were that the City of Altus, Oklahoma, had experienced a rapid growth in population thereby increasing the demand beyond its available water supply. In 1964 after engaging an engineering company to explore potential sources of water, it had received a report recommending a location in Texas as a new subsurface source for the production of water for the city's residents. Previously, in December of 1963, the Attorney General of Texas had rendered an opinion finding it legal for a Texas

property owner to sell water from under his land to an Oklahoma user. By December, 1964, the City of Altus had entered into a contract with a Texas landowner for the lease of his right to his subsurface water and had voted to issue 2 million dollars in city bonds to pay for the cost of financing, leasing, drilling, and transportation of water produced from this land to the city. The bonds were issued in May, 1965, and a lease duly executed to the city. Pursuant to this lease, over $100,000 had been expended in connection with the investigating and leasing of the subsurface water formation underlying these Texas lands. However, in January of 1965, the Texas legislature changed its law by prohibiting production of underground water for the purpose of transporting that water in interstate commerce. This prohibited the interstate transportation of ground water.

Texas law recognizes the right of a landowner to drill wells and appropriate all the underground percolating waters to his own purposes irrespective of his neighbor's needs or rights. This right is an interest in real estate which may be exercised by the landowner or made the subject of an independent grant of ownership. After the water has been appropriated, the landowner or his lessee or assign has the right to sell the water to others for use off of the land and outside of the basin, just as he could sell any other species of property. These rights are recognized by Texas statutes as property rights of sufficient character for ownership. *City of Altus, Oklahoma v. Carr, supra* at 840. Thus, Texas law recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce. The sole exception in Texas law was this prohibition against withdrawal of the water for interstate transportation. *Id.*

The federal district court found that the Texas statute had the affect of prohibiting interstate transportation of an article of commerce. It found that this prohibition was an unreasonable burden upon interstate commerce.

It was crucial to the decision in this case that Texas law recognized absolute ownership of water by an overlying landowner. The court specifically found that water in the State of Texas is an article of commerce. *City of Altus, Oklahoma, supra* at 840. Under the law of the State of Texas this is absolutely so. Further, the Texas statute was an absolute embargo upon the export of water. One commentator has also noted that there was a strong element of equitable estoppel in this case because of the reliance of the City of Altus coping with a severe water problem. It commenced preparation of a water supply project by investment of significant funds in the acquisition of land and water rights in conformity with Texas law and in reliance upon a Texas Attorney General's opinion before the Texas legislature abruptly changed that law. Charles E. Corker, *Can A State Embargo The Export of Water by Transbasin Diversions?*, 12 Idaho Law Review 135, 147 (1976).

Summary actions of this court do not have the same authority in this court as do decisions rendered after plenary consideration. *Metro Media Inc. v. City of San Diego*, — U. S. —, 101 S. Ct. 2882 (1981). Although summary dispositions by this court are considered decisions on the merits, the decisions extend only to "the precise issues presented and necessarily decided by those actions." *Id.* at 809, citing *Mandel v. Bradley*, 432 U. S. 173, 176 (1977). The decision in *Altus* should be limited to "the precise issues presented and necessarily decided" in that case.

The issues presented in *Altus* are entirely different from those presented in the case at bar. In *Altus* the

court was asked to rule upon a statute which absolutely prohibited export of water from one state to another. Water in the exporting state was considered an article of property and was permitted to be bought and sold and transferred at will without any state regulation under the law of that state. The court was faced with facts which presented an issue of estoppel by the plaintiff. The court ruled that under the facts and law presented, water was an article of commerce.

In the case at bar, water is treated entirely differently. Within the State of Nebraska, water may only be extracted and used pursuant to strict state regulations. Water may only be withdrawn from the ground for reasonable and beneficial use on the overlying land. *Prather v. Eisenmann, supra.* One's use of his ground water is limited by the doctrine of the "modified American rule" which limits the landowner's use of his water further to a use which will not harm his neighboring water user. *Prather v. Eisenmann, supra; State ex rel. Paul L. Douglas, Attorney General v. Sporhase and Moss, supra* (J.A. 113). Water may not be bought, sold, or transferred in a commercial nature. *Id.*

The case of *City of Altus, Oklahoma v. Carr,* also relied upon the analysis in the natural gas cases, *West v. Kansas Natural Gas Co.,* 221 U.S. 229 (1910) and *Commonwealth of Pennsylvania v. State of West Virginia,* 262 U.S. 553 (1923), which we have shown are inapplicable because of the unique character of water and its differences from natural gas and other natural resources.

The case of *City of Altus, Oklahoma v. Carr, supra,* should not be considered as precedent nor used in analysis in this case because of the uniqueness of water and the differences in the facts and law in that case.

The case of *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) should be followed as precedent.

This court in the case of *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), in an opinion written by Justice Oliver Wendell Holmes, has previously held that a state statute prohibiting the export of waters from its State into another State for use therein did not violate the Commerce Clause, Article I, Section 8 of the United States Constitution. The facts in that case were that the State of New Jersey, in the interest of preserving its fresh water for the health and prosperity of its citizens, enacted a statute which read: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." After the enactment of this statute, the defendant made a contract with the City of New York to furnish water for a burrough of that city from the Passaic River located in New Jersey. The water company brought an action to enjoin him from transporting water from New Jersey into New York, which injunction was issued on the basis of the New Jersey statute. The defendant claimed the statute violated the Commerce Clause of the United States Constitution, took property without due process of law, and denied citizens of other States the equal protection of the laws.

This court rejected these arguments:

> [I]t is recognized that the state, as quasi-sovereign and representative of the interests of the public, have the standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . (Citation omitted.)

> [I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it, substantially undisiminshed, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omni-present wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

Id. at 355-356. This case did not deal with the problems of irrigation and was not considering them. However, the fact that the water in our case is being used for irrigation should not change the outcome. Water, for whatever purpose, is too important to be treated as just another article of commerce. It is unique, and because of that uniqueness it must not thoughtlessly be characterized as any other natural resource. This court recognized that in *Hudson County Water Co.* and *West v. Kansas Natural Gas Co., supra* at 258-259.

The case of *Hudson County Water Co. v. McCarter, supra,* was correctly decided at the time, is correct now, is precedent, has never been overruled either expressly or *sub silentio.* It should be followed in this case.

II.

The regulation of the use, allocation and distribution of water resources while within the boundaries of the State

of Nebraska is a matter which has been exempted by Congress from the application of the Commerce Clause of the United States Constitution.

A. Congress may exempt a subject from application of the Commerce Clause.

The Congress pursuant to Article I, Section 8, Clause 3 of the United States Constitution has the power "To regulate commerce . . . among the several states." This power has been recognized to be "an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce." *Western and Southern Life Insurance Co. v. State Board of Equalization of California*, — U. S. —, 101 S. Ct. 2070, 2074 (1981), citing *Cooley v. Board of Wardens*, 56 U. S. (12 How) 299 (1952), and *Gibbons v. Ogden*, 22 U. S. (9 Wheat) 1, 209 (1824). By this grant of authority in the United States Constitution, Congress has the authority "to regulate commerce among the several states as it sees fit." *Id.* at 2074. In *Western and Southern Life Insurance Co. v. State Board of Equalization, supra*, this court reaffirmed its view that "Congress may 'confe[r] upon the States the ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *Id.* at 2075.[2] In that case, the court continued: "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Id.*

Likewise, in the case of *Merrion v. Jicarilla Apache Tribe*, — U. S. —, 42 CCH Supreme Court Bulletin B1118 (Decided January 25, 1982), this court held that a sovereign Indian tribe may enforce its own severance tax "un-

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2 Citing *Lewis v. BT Investment Managers Inc.*, 447 U. S. 27 (1980), *HP Hood and Sons Inc. v. DuMond*, 336 U. S. 525, 542-543.

less and until Congress divests this power. . . ." *Id.* at B1148. This court held in that case that in light of the Congressional legislation and the attempt by the Indian tribe to comply, this court would not invalidate the action of the tribal sovereign saying: "Courts are final arbiters under the Commerce Clause only when Congress has not acted." *Id.* at 1143.

B. Congress exempted water from the Commerce Clause by statute.

Congress has acted on the subject of water equally as decisively as it did for insurance.[3] Just as the McCarran-Ferguson Act removed the insurance industry from regulation as commerce, leaving such regulation to the States, the McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 666(a) and (c), the Reclamation Act of 1902, along with a whole series of other Congressional acts, operates to exempt regulation, allocation and distribution of water from the application of the Commerce Clause leaving it to the individual States. A list of 37 statutes enacted by Congress deferring to the States control of their water resources is contained in the appendix of supplementary materials submitted by Senator Kuchel to the Report Hearings on S. 1275 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88 Congress, 2d Sess. 302-310 (1964).

This history of the relationship between the federal government and the States in relation to control of water within the States is summarized by this court in *California v. United States*, 438 U. S. 645, 653: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western

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3 *Western and Southern Life Insurance Co. v. Board of Equalization, supra.*

States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."

In *California v. United States, supra*, this court interpreted the language of the Reclamation Act of 1902, Section 8, which reads:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .

Subsequent laws have each contained similar language.[4]

This deferral by Congress has been according to the specific plan and wisdom of the Members of Congress as reflected by the comments of several Members of Con-

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4 Mining Act of 1866, Ch. 262, 14 Stat. 251, The Act of July 9, 1870, 16 Stat. 218, Section 17; The Desert Lands Act of 1877, Ch. 7, 19 Stat. 377, 43 U. S. C. § 321; The Act of March 3, 1891, 26 Stat. 1101, Section 1; The Act of February 26, 1897, 29 Stat. 599, 43 U. S. C. § 664; Act of June 4, 1897, 30 Stat. 36, 16 U. S. C. § 481; The Reclamation Act of 1902, 32 Stat. 388; Act of February 1, 1905, Section 4, 33 Stat. 629, 16 U. S. C. § 315 (b); Federal Power Act of 1920, 41 Stat. 1068, 1077, 16 U. S. C. §§ 802 (b), 821; Boulder Power Project Act of 1928, Section 18, 45 Stat. 1065, 43 U. S. C. § 17 (q); The Taylor Grazing Act of June 28, 1934, Section 3, 48 Stat. 1271, 43 U. S. C. § 315 (b).

The Boulder Canyon Project Adjustment Act of July 19, 1940, Section 14, 54 Stat. 779, 43 U. S. C. § 618 (m); Flood Control Act of December 22, 1944, Section 1, 58 Stat. 888-889, The Act of October 14, 1949, Section 2, 63 Stat. 852; The McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 66 (a) and (c); The Submerged Lands Act of May 22, 1953, Section 3 (e), 66 Stat. 31, 43 U. S. C. § 1311 (e); The Act of July 23, 1955, Section 4 (b), 69 Stat. 368-369, 30 U. S. C. § 612 (b); The Small Reclamation Projects Act of August 6, 1956, Section 4 (b), 70 Stat. 1045, 43 U. S. C. § 422 (d).

gress addressing specific pieces of legislation. In *California v. United States, supra* at 661, footnote 16, this court quoted from the addresses of several of these congressmen pertaining to the Act of 1897:

> . . .
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> "It is the State alone that owns and controls the water, under the constitution of our States; and I suppose that is true under the laws of every State." Id., [29 Cong. Rec. 1948-1949 (1897)] at 1951 (Cong. Bell). "The amendment which has been proposed by the gentleman from Illinois [Mr. Cannon], and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters." Id. at 1952 (Cong. Shafroth).

Congressman Mondell recognized this when he said: "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard" *California v. United States* at 669. The reason for this was then stated by Senator Clark of Wyoming in 1902 when he said:

> ". . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.
>
> "Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. To take from these

> experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer. . . ." Ibid.

California v. United States, supra at 667.

The Congressional understanding and intent is no more clearly expressed than in the Senate Report on the McCarran Amendment which was cited in *California v. United States:*

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. . . . S. Rep. No. 755, 82d Cong, 1st Sess, 3, 6 (1951).

California v. United States, supra at 678.

C. Congress exempted water from application of the Commerce Clause by its approval of inter-state compacts on water.

The exemption by Congress of water from application of the Commerce Clause is clearly shown by the system of inter-State compacts which have been enacted by the States and approved by Congress on many of the rivers and waterways of the nation.[5] Congress must approve inter-State compacts pursuant to Article I, Section 10 of the United States Constitution. Nebraska is a party

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5 See a listing of 23 Interstate Water Apportionment Compacts approved by Congress in *Interstate Compacts, 1783-1977 (A Revised Compilation)*, The Council of State Governments, Lexington, Kentucky (1977) at 23-26. Additional interstate compacts relating to water resources and flood control are listed at 26-27.

to two compacts with the State of Colorado upon rivers in the specific locality involved in this suit. Flowing just to the north of the locale where the pump is located in this suit is the South Platte River. The States of Nebraska and Colorado entered into a compact on the South Platte River which was approved by Nebraska in 1923.[6] This compact was approved by Congress at 44 Stat. 195 in 1926. In this compact, the two states apportioned the water flowing in the South Platte River in accordance with what they thought to be fair at the time. The rights of each State to the water flowing in the river are specifically addressed. The right of each State to regulate the water apportioned to it is also specifically recognized. The right of each state to the use of other waters is also discussed. And, it specifically states that "The physical and other conditions peculiar to the South Platte River and to the territory drained and served thereby constitute the basis for this compact. . . ." South Platte Compact, Article IX.

The Republican River flows from Colorado into Nebraska just to the south of appellants' irrigation well. The States of Colorado, Kansas and Nebraska were parties to this compact which was entered on December 31, 1942.[7] A determination is made of the water flowing in each of the drainage basins serving the Republican River and an allocation made between each of the States of the total water flowing in each for the beneficial use of that State. The compact specifically recognizes that the waters shall be allocated subject to the laws of each of the States. This compact was approved by Congress in 1943 in Public Law 60 of the 78th Congress.

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6 Neb. Rev. Stat. Volume 2A, Appendix at 788.

7 Neb. Rev. Stat. Volume 2A Appendix G.

Although neither of these compacts deals specifically with the water involved in this case, each relates to water flowing in the drainage basins nearest appellants' land. They constitute a specific deferral by Congress to the individual States in water matters even when the water is crossing State lines.

Congress has clearly exempted water resources from application of the Commerce Clause of the Constitution by its repeated specific recognition that the water laws of the various states shall be supreme in the use, allocation and distribution of water within its boundaries, and by the specific approval of water appropriation compacts between the States on the nation's rivers and waterways. If Congress has the authority to withdraw this exemption of water matters from the States sometime in the future, it has not done so to date. This court should follow the reasoning in its prior decisions in *State of California v. United States, supra,* and *Merrion v. Jicarilla Apache Tribe, et al., supra,* and *Western and Southern Life Insurance Co. Inc. v. Board of Equalization, supra,* to hold that although Congress has the power to divest the states of their authority in the area of the use, allocation and distribution of water, until it decides to do so, the States have the power to control the water within their borders and may limit its exportation as required in its wisdom by its water conservation policies.

III.

The challenged Nebraska statute promotes a legitimate local public interest without an unreasonable burden upon interstate commerce.

A. Pike v. Bruce Church, Inc. is the rule.

The general rule for determining the validity of a State statute affecting interstate commerce was stated in *Pike v. Bruce Church, Inc.,* 397 U. S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (Citations omitted.) If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 142.

This rule was recognized in *Minnesota v. Clover Leaf Creamery Co.*, — U. S. —, 101 S. Ct. 715, 728 (1981). A State statute purporting to promote legitimate State interests but in reality promoting "simple economic protectionism" has been held invalid per se. *Philadelphia v. New Jersey*, 437 U. S. 617, 624 (1978), *Minnesota v. Clover Leaf Creamery Co., supra.*

B. The Nebraska Statute effectuates a legitimate local public interest.

Environmental protection and resource conservation have been recognized as areas of legitimate local concern for State legislatures. *Minnesota v. Clover Leaf Creamery Co., supra* at 727. Indeed, the appellants concede in their brief that "[t]he Nebraska statute regulating the exportation of water is concerned with a justifiable, legitimate state interest." Appellant's brief at 19. The statute is based upon the Nebraska Constitution, Article XV, Section 4 and Section 5,[8] recognizing water as a publicly held resource.

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8 "Section 4. Water and Necessity. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

"Section 5. Use of Water Dedicated to People. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the State for beneficial purposes, subject to the provisions of the following section."

This statute was originally enacted into law in 1967 by an act relating to ground water requiring registration of all except small domestic wells in the state and regulating the taking of ground water for use in an adjoining state.[9] The bill was the result of Recommendation No. 11 of the Interim Study Committee of the Nebraska Unicameral which had been formed to study water policy within the state. This particular section was added to the bill to comply with a Kansas reciprocity statute and thereby sought to enable Nebraska citizens to import water from that state as well as protect Nebraska ground water.[10] Indeed, the preamble to LB 415, Nebraska Legislature, Seventy-Seventh Session, 1967, stated the purpose: "The Legislature finds, recognizes and declares that the conservation of ground water and the beneficial use thereof are essential to the well-being of this state." This may also be found at Neb. Rev. Stat. § 46-401 (Reissue 1978).

In his presentation at the public hearing, Senator Kremer began his introduction of the bill saying:

> Nebraska, like the other states of our nation, is experiencing some problems. In a greater degree as time goes on, we use more and more water, in the field of domestic use, in the field of manufacturing, in the field of agriculture, and in the field of recreation. There is only so much water and when this water is polluted or used up to the extent that there is no more, in some areas at least, we reach a real crisis. Some states are reaching that now. There is divided opinion of how much water we have in Nebraska, how long it will last, do we have enough water, and along with some of our other natural resources, is there anything we can do about it in Nebraska, to further develop this great natural resource, to keep it clean and pure, like we know it to be at least in most areas today. . . . There was the

9 1967 Nebraska Session Laws, Ch. 281, LB 415, page 759.
10 Senator Ely, Floor Debate on LB 415, March 8, 1967, p. 765.

> feeling of the Legislature at that time that we need to look at this natural resource on a state-wide basis, and . . . there has been requests . . . in the way of letters, personal contact—"please legislate or bring about a bill that would do so and so in certain areas of development and the preservation of our water resources."

Committee hearing on LB 1357 before the Agriculture and Recreation Committee, May 1, 1969.

This statute was amended in 1969 in Legislative Bill (LB) 1357.[11] This act was a comprehensive reorganization of soil, water and natural resource districts as a result of Recommendation No. 2 of the Report of the Nebraska Legislative Council Committee on Ground and Surface Water of 1968. By this legislation, natural resources districts were formed by the consolidation of a multitude of single purpose conservation districts. They were provided with broad powers to carry out resource planning, development and management and utilization of the land and water resources including: erosion prevention and control; prevention of damages from flood water and sediment; flood prevention and control; soil conservation; water supply for beneficial uses; development, management, utilization and conservation of ground and surface water; pollution control; solid waste disposal and sanitary drainage improvement and channel rectification; management of fish and wildlife habitat; development of recreational and park facilities; forestry and range management, and mosquito abatement.[12] The preamble read: "The Legislature hereby recognizes and declares that it is essential to the health and welfare of the people of the State of Nebraska to conserve, protect, develop and manage the natural resources of this state."

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11 1969 Nebraska Session Laws, Ch. 9, LB 1357, pages 99, 144.
12 Introducer's Statement of Purpose, LB 1357, May 1, 1969.

Among the natural resources conserved, developed and protected by this statute was ground water. (Nebraska Session Laws, 1969, Ch. 9, LB 1357, Section 1, page 100.)

Senator Kremer when introducing the bill on the floor of the Unicameral, stated that it resulted from a "study of our natural resources assets, problems related to them, what needs to be done to further develop the tremendous contribution that our natural resources make to the total economy in the State of Nebraska." Floor debate of Senator Kremer on LB 1357 in the Nebraska Legislature, August 12, 1969. Senator Nore in a floor debate upon this bill on August 25, 1969, recounted the work of the study committee in developing this bill: "[W]e had the state water plan two years ago . . . and our study committee held hearings from one end of the state to the other, north, east, west, south. We had full house attendance at most every place that we met. . . ." (Floor debate of Senator Nore on LB 1357 on August 25, 1969, at page 4341.) Senator Nore continued this account by outlining the need for this legislation:

> We are going to have a water problem. I do considerable irrigating myself and I know, and I am almost sure that we are going to run out of underground water, not clear out but we are going to be short. And then we are going to wonder why didn't we do something thirty, forty, or fifty years ago or ten years ago or five years ago. This is the kind of legislation that is probably one of the most important activities that we are participating in this year. . . .

Id. at 4341-4342.

Section 69 of that bill amended Neb. Rev. Stat. § 46-613.01 to permit the Director of Water Resources to issue a permit upon the finding that the request is reasonable, not contrary to conservation and use of ground water, and not detrimental to the public welfare. 1969 Nebraska Ses-

sion Laws Ch. 9, LB 1357, 99 at 44. This section was incorporated in the act to protect Nebraska ground water and permit reciprocity with the State of Kansas for the benefit of citizens of both states. (Floor debate by Senator Ziebarth, August 25, 1969, Nebraska Unicameral at 4313-4314.)

C. The Nebraska statute regulates even-handedly.

The Nebraska statute regulates even-handedly on all seeking to export water from Nebraska irrespective of their state of residence or citizenship. The permit qualifications apply equally to all. The only exception is that a permit may not be issued to export water into a state without the ability to import water from that state. The use of different statutory classifications by a state to encourage more favorable treatment for its residents from another state is not per se unconstitutional. *Western and Southern Life Insurance Co. v. State Board of Equalization of California, supra.* The burden of proving discrimination is upon the party challenging the statute's validity. *Hughes v. Oklahoma*, 441 U. S. 322, 336 (1979). No evidence of discrimination against interstate commerce has been shown by the appellants. In fact, appellants at no time attempted to satisfy the requirements of this statute. Appellants and other predecessors in interest never applied for a permit. No determination by the Director of the Department of Water Resources was ever made as to whether appellants' withdrawal, transportation and use of the water would satisfy any of the other requirements of the statute which appellant finds valid. Appellants were never denied the issuance of a permit (J.A. 38; Volume I, Bill of Exceptions, 46:25-47:6). This is so notwithstanding appellants' assertions to the contrary (Appellants' brief at 19).

Appellants allege the statute is an absolute bar against the export of Nebraska ground water. This is

not true. Compare the Colorado Ground Water Export Statute, Colorado Rev. Stat. § 37-90-136 (1973), which absolutely prohibits the export of Colorado ground water (Appellee's Motion in the Alternative to Dismiss or to Affirm, Appendix A). Such is not the case with the Nebraska statute. This statute permits export of ground water upon satisfaction of certain conditions and findings. It applies equally to all persons applying. The result may be different depending upon the circumstances revealed by each application. Colorado Revised Statute 37-81-101 is inapplicable because it deals with surface water only. (See Appellants' Brief at 3.)

D. The public interest in ground water conservation outweighs any burden imposed upon Interstate Commerce by the Nebraska statute.

The burden, if any, upon interstate commerce imposed by the Nebraska statute is merely incidental. No applications for transfer of ground water have been made to the Director of Water Resources in Nebraska since the enactment of this statute (Volume I, Bill of Exceptions 38:3-16). Thus, no denials have ever been issued. Since ground water is not a commodity within the state, and when irrigating must be applied to the land whence it is pumped, it is not a subject of commercial transactions. *State of Nebraska v. Sporhase and Moss, supra.* The object of this statute was conservation of the state's ground water. This is a substantial state interest as appellants admit (Appellants' brief at 19). Appellants accept all of the challenged statute with the exception of the reciprocity clause. Reciprocity serves the purposes of (1) enabling adjoining states to share their ground water; (2) enabling Nebraska to have a mechanism for maintaining an equilibrium in exports and imports so as not to disrupt its ground water conservation and goals; (3) encourag-

ing adjoining States to Nebraska to develop and enforce complementary ground water preservation policies to avoid a race to the bottom of the aquifer. Reciprocity is necessary to insure that this State could be beneficiary as well as donor of ground water. Absent such a requirement, the issuance of permits for export of Nebraska ground water could lead to mining and depletion of the Nebraska ground water reserves.[13]

Appellants claim that Nebraska could have attained the goals it was seeking by deleting the reciprocity requirement from the statute. Such a proposal would merely place the concept of reciprocity within the consideration of one of the other statutory criteria for issuance of the permit. In other words, the Director would have to consider in determining the reasonableness of the withdrawal or whether the use is "contrary to the conservation . . . of ground water" or is "not otherwise detrimental to the public welfare" whether the State will be able to import ground water to make up for this loss either now or in the future.

Certainly, such a proposal would satisfy the appellants. If they cannot qualify for installation of an irrigation well in Colorado for the land they want to irrigate in Colorado, then they can go unfettered across the border and import ground water. By doing so, they are permitted to frustrate the internal ground water conservation goals and efforts of the State of Colorado, while

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13 Ground water mining has become a concern of not only this State but of the States of Colorado, Kansas, Oklahoma, Texas and New Mexico in the High Plains Region overlying the Ogallala Aquifer. Recently, Congress authorized a study of the Ogallala Aquifer based up the ground water mining and depletion caused by the dramatic increase in the use of ground water for irrigation in the west since 1955. Aiken, *Ground Water Mining Law and Policy*, 53 Colo. L. Rev. — (To be published in 1982).

at the same time frustrating those goals and efforts of the neighboring State of Nebraska.[14]

Such a proposal is not a reasonable alternative to the reciprocity clause. Although ground water would be freely shared between adjoining states, each state would be frustrated in its own attempt to manage, conserve and preserve its own ground water reserves. Nebraska, as each of the western states, including Colorado, has enacted a comprehensive water management scheme for both ground and surface waters pursuant to broad policies and goals.[15] These schemes and the policies upon which they are based are not always the same, but are determined by the legislators of each of these sovereign States, according to the availability of and need for water in each State. Indeed, appellants' Nebraska land and well are located within a water critical township within a Ground Water Control Area where the Director of Water Resources has specifically found that "the ground water supply is . . . *inadequate* to meet present or reasonably foreseeable needs for the beneficial use of such water supply. . . ." (Emphasis added.) (J.A. 59).

Without the ability to require reciprocity for the export of ground water, the water conservation policies of the individual sovereign States would be frustrated leading to a race to the bottom of the aquifer. The State would not be able to control withdrawal of ground water within its boundaries. The beneficiaries of the water

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14 See amicus curiae brief filed by the State of Colorado and other western states in this case for further discussion of the comprehensive state-wide water conservation policies and statute of the State of Colorado and appellants' inability to obtain a ground water permit in the State of Colorado to irrigate its Colorado land.

15 For a full discussion of Nebraska's ground water schemes, see Aiken, *Nebraska Ground Water Law and Administration*, 559 Neb. L. Rev. 917 (1980).

would be determined solely by who uses the water first, and future generations would suffer. The other alternative is the application of a silent de facto reciprocity consideration.

Appellant relies upon the case of *Great Atlantic and Pacific Tea Co. Inc. v. Cottrell*, 424 U.S. 366 (1976) in which this court invalidated a Mississippi regulation excluding milk from another State except where that State offered reciprocity to Mississippi milk. In this case, the court found that the mandatory character of the reciprocity requirement unduly burdened interstate commerce and could not be justified under the state police power. It found that the statute actually did not serve the purpose for which it was intended. In light of this, this court said: "Only state interests of substantial importance can save [this reciprocity clause] in the face of that devasting effect upon the free flow of interstate milk." *Id.* at 375. The Nebraska statute does serve its purpose of conserving and preserving ground water. This interest is of more "substantial importance" than that in *Cottrell*. Although the interest in *Cottrell* was maintenance of high health standards, it was shown that reciprocity actually permitted acceptance of lower standards. In our case, reciprocity permits export of ground water only when imports are also permitted. Therefore it provides for maintenance of an equilibrium in Nebraska's ground water reserves and the conservation of its ground water. Appellants claim there is no guarantee that Nebraska will be able to import ground water from a reciprocal State. Of course, this is true. As in all water matters there are no guarantees. The reciprocity clause, however, does remove the legal barriers to the importation of such water. No matter if the adjoining state is water rich or water poor, there are instances and circumstances where

importation pursuant to State permit requirements and reciprocity may be feasible between any two States. Nebraska's statute was enacted in order to permit importation of water into Nebraska from Kansas because of the proximity of the importer to the water source.[16]

The Nebraska statute Neb. Rev. Stat. § 46-613.01 promotes a legitimate State interest, has no reasonable alternative, and is therefore consistent with the Commerce Clause of the United States Constitution.

IV.

The Nebraska statute does not deprive the appellants of equal protection of the law protected by the Fourteenth Amendment of the United States Constitution.

A. The Equal Protection Standard.

An evaluation of the challenge to a State statute upon the grounds of violation of equal protection of the laws must address two questions:

(1) Does the challenged legislation have a legitimate state purpose?

(2) Was it reasonable for the lawmakers to believe that use of the challenge classification would promote that purpose?

Vance v. Bradley, 440 U. S. 93, 97 (1979), *Minnesota v. Clover Leaf Creamery Co.*, — U. S. —, 101 S. Ct. 715 (1981). In *Vance v. Bradley, supra*, this court said that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the Legislature's actions were irrational."

The purposes articulated by the Legislature will be presumed to be the actual purposes of the statute unless

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16 Floor debate by Senator Ziebarth, August 25, 1969, Nebraska Unicameral at 4313-4314.

an examination of the circumstances forces the court to conclude that they could not have been the goal of the Legislature. *Minnesota v. Clover Leaf Creamery Co., supra,* 101 S. Ct. at 723, footnote 7. Challengers bear the burden of convincing the court that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co., supra,* quoting *Vance v. Bradley, supra,* 440 U. S. at 111.

The Equal Protection Clause is satisfied if you conclude that the Legislature "rationally could have believed that the [challenged statute] would promote its objective." *Western and Southern Life Insurance Co. v. Board of Equalization, supra,* — U. S. —, 101 S. Ct. 2086. The challengers cannot prevail so long as "it is evident from all the considerations presented to the [Legislature], and those of which we may take judicial notice, that the question is at least debatable." *Minnesota v. Clover Leaf Creamery Co., supra,* — U. S. —, 101 S. Ct. 115, citing *United States v. Carolene Products Co.,* 304 U. S. 144, 153-154.

B. The Nebraska statute bears a rational relationship to a legitimate state interest.

The appellants have admitted that the protection and preservation of the State's ground water is a legitimate State purpose. This court in *Minnesota v. Clover Leaf Creamery Co., supra,* found that the challenged Minnesota statute enacted to promote resource conservation served a "substantial state purpose." *Id.* The challenged Nebraska statute, when it was originally enacted and again when it was amended, was part of a comprehensive program promoting conservation and preservation of ground water within the State, pursuant to

a State water plan. The reciprocity section of this statute is part of the comprehensive plan to preserve and conserve ground water for future generations.[17] Is is evident from the discussion of the legislative history in section III of this brief that the purpose of this legislation was to promote the conservation and preservation of ground water. The Nebraska ground water policies and statutes and their development are discussed by J. David Aiken, in "Nebraska Ground Water Law and Administration" 59 Neb. L. Rev. 917 (1980). These statutes include a system for preferences (Nebraska Constitution, Article XV, Section 6), well registration requirements, well spacing requirements, well abandonment requirements, check valve requirements, irrigation runoff control requirements, liability for road damage from irrigation, artesian water control requirements, permit requirements for ground water withdrawals from permits near streams, permit requirements for interstate ground water transfers, ground water control area regulations, and regulation of illegal wells.[18]

By all of this extensive legislation in the field of ground water monitoring, control and preservation, Nebraska has attempted to insure that water is conserved and available to all people who need and want it for the next generations, discouraging its waste. This management of the State's water resources has extended from as early as the year 1889 when the Legislature first began recognizing appropriative rights in surface waters and has been added to as the use and needs for the water, both surface and ground water, have demanded.[19]

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17 See the comments of Senator Ely, Senator Nore, Senator Zwiebarth, and Senator Kremer, above.

18 Aiken, *Ground Water Law and Administration, supra* at 976.

19 *Id.*

The statute here can reasonably be believed by the Legislature to promote the purpose of conservation and beneficial use of the State's waters for generations to come. It requires the Director of the Department of Water Resources to evaluate an application for ground water transfer to find that it is reasonable, not contrary, to the conservation and use of ground water, and not otherwise detrimental to the public welfare. Neb. Rev. Stat. § 46-613.01 (Reissue 1978). The Director is required to grant the permit "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in the State of Nebraska." Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The Legislature could believe that this would conserve water and promote its beneficial use by (1) insuring that the importing state makes the best use of the imported water as well as the water in that state; (2) by insuring that its own ground water conservation policies will not be frustrated by the exportation of all its water; (3) by promoting the institution of complementary ground water conservation policies in adjoining states.

The mere fact that a state seeks to promote its legitimate interests by influencing the policies of other states, does not render the legitimate purposes of that state illegitimate. *Western and Southern Life Insurance Co. v. State Board of Equalization, supra.* In this case the court held that a retaliatory tax on insurance companies did not violate the Equal Protection Clause of the Constitution since the tax had a legitimate state purpose and it was reasonable to believe that the tax would promote that purpose of discouraging states from enacting discriminatry taxes against its own insurance companies.

Appellants criticize the wisdom of the Nebraska statute suggesting that the only requirements should be the reasonable use of the water without a reciprocity requirement. The wisdom of legislation is not the proper subject of an evaluation under the Equal Protection Clause. It is up to Legislatures, not the courts, to decide the wisdom and utility of legislation. *Minnesota v. Clover Leaf Creamery Co., supra.* If a question is debatable, the act will be sustained, and it is not the function of the courts to substitute their evaluation of the legislative facts for those of the Legislature. *Minnesota v. Clover Leaf Creamery Co., supra.*

Appellants claim the case of *Great Atlantic & Pacific Tea Co., Inc. v. Hugh B. Cottrell,* 424 U.S. 366 (1976) supports their contention that the Equal Protection Clause is violated. To the contrary, this court specifically stated, at 369, footnote 3: "Appellant also alleged a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. In view of our conclusion we have no occasion to address that claim."

The challenged statute serves a legitimate state purpose and it was reasonable for the legislators to believe that the use of the challenged classification would promote that purpose. The requirements of Equal Protection are satisfied.

V.

The Nebraska statute does not deprive the appellants of their rights to Due Process pursuant to the United States Constitution by depriving the appellants of liberty of property without compensation.

A. Due Process Standard.

This court said in *Great Atlantic and Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 371 (1976) that "under our constitutional scheme the States retain 'broad power' to leg-

islate protection for their citizens in matters of local concerns . . . (Citation omitted) and that not every exercise of local control is invalid merely because it effects in some way the flow of commerce between the States." The question to be answered in evaluation of a challenged statute on due process grounds is whether that statute bears a reasonable relation to the state's legitimate objectives. *Exxon Corporation v. Governor of Maryland*, 437 U. S. 117, 125. In making this evaluation, courts will not "sit as a super-legislature to weigh the wisdom of the legislation." *Ferguson v. Skrupa*, 372 U. S. 726, 731; *Exxon Corporation v. Governor of Maryland, supra* at 124.

B. The Nebraska statute bears a rational relation to a legitimate state objective.

As we discussed in section III herein, conservation and preservation of ground water are legitimate state objectives. The question, therefore, is whether a statute requiring a permit for the export of ground water and conditioning it upon reciprocity by the receiving state bears a reasonable and rational relationship to that objective. There is no doubt that this is so. Requiring a permit upon the finding by the Director of Water Resources that the withdrawal is "reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare" certainly bears a rational relationship to the objective of conserving ground water.

The requirement of reciprocity by the importing state also serves the objective of conservation of ground water. As stated earlier, this requirement serves the Legislature's purpose of conserving ground water by promoting conservation in the adjoining State, promoting reciprocity of ground water exchange in the adjoining State, promoting

ground water conservation in the State of Nebraska, and promoting complementary ground water policies in the adjoining state for furture generations.

Appellant argues that this requirement does nothing more than to oppress individuals, denying them the reasonable use of their land, and preventing them from irrigating and growing crops. On the contrary, this requirement has no such affect. Any landowner may apply to withdraw water from underneath his land. If he cannot satisfy the requirements of his local State statute, as designed to promote that State's conservation policies, his remedies would be with the courts of that State. In our case, irrigation is not necessary to grow crops on the land appellants seek to irrigate. In fact, they are not being prevented from growing crops or irrigating their land. They are only being denied a particular use of their land. In *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908) Justice Holmes stated: "A man cannot acquire a right to property by his desire to use it in commerce among the states. . . ." *Id.* at 257. In this case, this court found no violation in the Due Process Clause or the Commerce Clause or the Equal Protection Clause of the United States Constitution by New Jersey's absolute prohibition against the diversion of water outside the boundaries of the State. This court has repeatedly recognized the right of the local community exercising its legitimate police power of zoning to regulate growth. *Village of Belle Terre v. Borass,* 416 U.S. 1. (1974). No one has an absolute right to use his property as he wishes.

Appellants claim they have proprietary interest in the withdrawal of their ground water of which they are being unconstitutionally deprived. The Nebraska Supreme Court in the case of *In re Water Appropriation Nos. 4424,*

461, 462 and 485, supra, specifically reiterated their earlier holding that based upon the Nebraska Constitution, acquisitions of rights in the use of water within the State of Nebraska are subject to change by "such reasonable regulation subsequently adopted by virtue of the police power of the state." *Id.* at 274. In the instant case, the court reiterated its earlier holding that one does not acquire a right to the water but only a right to *use* the water. This right of use is a usufruct and may be limited.

Appellants' argument that the Nebraska Legislature has delegated its authority to the legislature of another state is groundless. The Nebraska Legislature's requirement is only a condition. This State's Legislature has determined what its policy will be. That policy is designed to and does promote the conservation and preservation of ground water for the use of future generations in both the adjoining States. It does not deprive the appellants of any right without due process of law.

CONCLUSION

The judgment of the Supreme Court of the State of Nebraska should be affirmed. Water in Nebraska is not an article of commerce subject to the Commerce Clause of the Constitution. Because of its unique nature, uniformity of treatment throughout the nation is neither required nor justified. Even if the Commerce Clause applies to water, Congress has specifically exempted it from those restrictions by its statutes and approval of interstate water compacts.

Even if the Commerce Clause is held applicable to the Nebraska statute, it is rationally related to a legitimate public interest which overrides any burden which it places upon interstate commerce. The statute bears a ra-

tional relationship to legitimate state interests and thus violates neither the Equal Protection or Due Process Clauses of the Constitution.

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No. 81-613

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE, et al.,

Appellants,

v.

STATE OF NEBRASKA, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

Brief of the State of California as Amicus Curiae, Urging Affirmance

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INTEREST OF AMICUS

The State of California is highly dependent upon its groundwater resources. Each year, roughly 40 percent of the State's applied water needs are met through the use of water pumped from the State's groundwater basins.[1] Although the usable storage capacity of those basins is large (about 143 million acre feet), the demand for water is so great that annual groundwater pumping exceeds recharge in some basins and results in a statewide overdraft of several million acre-feet of water per year. In California's San Joaquin Valley, in particular, the overdrafting of groundwater supplies has reached critical proportions and has caused declining

1. California Department of Water Resources, Bulletin No. 118, "California Groundwater" p. 3 (1975).

groundwater levels, salinity intrusion and wide spread land subsidence.[2]

Because of the importance of the state's groundwater resources, California's Legislature has long taken the view that groundwater management is of vital concern to the people of the state and that the state shall determine in what way its groundwater should be developed for the greatest public benefit. Cal. Water Code §§ 104, 105. California's Supreme Court, in turn, has long held that groundwater is included within a provision of the state's constitution which requires water to be reasonably and beneficially used and diverted. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 372; 40 P.2d 486, 498 (1935); Calif. Const. art. X, § 2. Pursuant to legislation enacted to implement this constitutional provision, California's Water Resources Control Board has acted to prohibit certain inter-basin transfers of groundwater for the reason that such transfers may be unreasonable within the meaning of the state's Constitution since they could seriously aggravate overdraft conditions. (See Decision 1474, State Water Resources Control Board, adopted September 22, 1977).

The principal question presented in this case is whether and to what extent the Commerce Clause of the United States Constitution imposes restrictions upon the authority of the States to administer their groundwater resources. In the view of the appellants, Article I, Section 8 of the Constitution serves to substantially limit state regulatory authority over the extraction of groundwater that is intended for use in another state or that is used to produce crops or other commodities intended for interstate shipment. If adopted by this Court, appellants' position would have a major adverse impact upon state efforts to rationally regulate groundwater resources. In California, for example, the large majority of crops produced with extracted groundwater are intended for interstate shipment. Appellants' position could thus vitiate California's regulatory efforts.

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2. California Department of Water Resources, Bulletin No. 118-80 "Groundwater Basins in California, A Report to the California Legislature," pp. 44-47.

Nor does it appear that the impact of appellants' position, if adopted by this Court, would be confined to groundwater. If the Commerce Clause precludes state efforts to regulate the diversion and use of *groundwater* as appellants contend, the same broad proscriptions would logically exist in connection with state efforts to regulate the use and diversion of *surface* waters. Hence, appellants' position, if applied in California, would not only disrupt groundwater regulation; it would induce chaos in California's carefully considered effort to assure that *all* water (surface and groundwater) is reasonably and beneficially used. In very real terms, it would transfer the administration of California's water resources from an expert state agency applying state law concepts of reasonable and beneficial use, to the federal courts which would apply federal Commerce Clause concepts to determine the legality of state water use and diversion. In one neat stroke, the years of federal deference to state water administration which this Court has affirmed in recent opinions, would be reversed. California has an obvious interest in opposing such a result.

SUMMARY OF ARGUMENT

At no time has the Court held, or even suggested, that the resolution of disputes over water is to be controlled by broad Commerce Clause principles. Indeed, to the contrary, it has long been held, and recently reconfirmed by this Court that there exist only two limitations on a state's authority over its internal waters —reserved rig'ıts that may be necessary for the beneficial use of federal property and the navigation servitude. Otherwise, a state's authority over its waters is "exclusive" and "total". With regard to disputes over waters flowing between states, this Court has developed and applied the doctrine of equitable apportionment. Pursuant to that doctrine, the Court resolves disputes between states—not through a Commerce Clause analysis—but rather through an examination of pertinent *state* laws and a weighing of physical factors such as climatic conditions and the extent of established uses in competing states.

Judicial restraint in the area of water resource management has been paralleled by the long-continued deference of Congress to state control of water resources and state resolution of water resource conflicts. As this Court recently noted, the history of the relationship between the federal government and the states in the reclamation of the arid lands of the West is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. Not only is that deference found in the Reclamation Act, but, as this Court has recognized, it exists in the policy of the McCarran Amendment (43 U.S.C. § 666(a)). That amendment recognizes the competency of the states to deal with their own water problems and evinces a policy of avoiding piecemeal adjudication of water rights by permitting the joinder of the United States in state court suits to determine the validity and priority of claims to water. In effect, water has been recognized, both by this Court and by Congress, as a unique resource integral to the well being of the states and traditionally managed by them under principles of state law, subject only to federal reserved rights and the navigation servitude.

The appellants' effort to have the validity of Nebraska's groundwater management law measured against the Commerce Clause is thus inconsistent with the decisions of this Court which have set forth the limitations on state water management authority. It is additionally inconsistent with decades of congressional deference to state water law. Finally, it is inconsistent with the recent pronouncements of this Court which hold that the Commerce Clause does not operate to displace the states' freedom to manage integral operations in areas of traditional governmental functions.

In addition to being at odds with the opinions of this Court and the actions of Congress, appellants' Commerce Clause arguments also constitute bad policy and would be virtually unworkable in practice. If those arguments are adopted, the result would be the creation of a dual system of water rights in the same locality. Water drawn from an intrastate stream and used to grow crops sold locally would ultimately be controlled by state law principles. Water drawn from that same stream and used to grow crops sold

in interstate commerce, on the other hand, would be ultimately controlled by federal law principles grounded in the Commerce Clause. The Commerce Clause, in short, could be used by private persons to obtain a right to water that could not be obtained under state water rights laws. Quite rightly this Court recently noted that such a dual system of rights would result in complete "legal confusion." Manifestly, the administration of such a dual system of water rights and legal principles would be impossible.

It should also be noted, finally, that the Commerce Clause arguments raised by appellants logically cannot be limited just to state groundwater resources. If groundwater management controls are subject to invalidation on Commerce Clause grounds, then there appears to be no reason why those same controls, if applied to surface waters, should not be invalidated for precisely the same reasons. Accordingly, it would be erroneous to view this case as presenting a unique factual setting wherein the Commerce Clause should be applied simply because the precedential impact of such a decision would be limited. Rather, it should be viewed for exactly what it is: a case which raises major constitutional questions whose answers will apply to the management of *all* state waters, surface *or* underground. Precisely because this case will have an impact that reaches well beyond the management of groundwater, we have couched our arguments herein in terms which include the management of surface waters as well as groundwater.

ARGUMENT

APPELLANT'S ATTEMPT TO FEDERALIZE WATER RESOURCE ADMINISTRATION THROUGH THE COMMERCE CLAUSE IS INCONSISTENT WITH THE PRIOR RULINGS OF THIS COURT, THE COMMON THREAD OF LONG-CONTINUED CONGRESSIONAL ACTION AND THE PUBLIC'S INTEREST IN SOUND WATER RESOURCE MANAGEMENT.

Among the important factors contributing to the growth and development of this country as a nation has been the wise utilization of its water resources. The development of the relatively abundant water resources of the East to power the industrial

revolution, the development of the scarce water resources of the West to fuel the agrarian revolution and the selective preservation of water resources to meet the recreational and aesthetic needs of urban and rural dwellers, have all generated substantial benefits that are enjoyed by the nation as a whole. It is important to recognize, however, that while the benefits of water resource management have spread without regard to political boundaries, those benefits have not been generated by a federalized system of water administration. Rather, they have invariably been provided by state systems which respond to localized needs, local geography and local availability of water resources. Invariably too, these state management systems are controlled by legal regimes which reflect the differences of the localities in which they operate.

In its recent landmark opinion in *California v. United States* (1978) 438 U.S. 645, this Court explained the circumstances which compelled local water management under differing legal regimes:

> "The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had." 438 U.S. at 648.

Among the several States, those in the West have developed a particularly heavy reliance upon local water management. Again, this reliance is dictated by the local circumstances in which the

Western States find themselves. These circumstances, unique to the Western States, are encapsulated in the word "arid," which is often used to describe the states west of the 100th meridian. As this Court recently stated, "[i]t is possible that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colorado River Water Cons. Dist. v. United States* (1976) 424 U.S. 800, 804.

It is the principle of local management of the unique and substantial problems of scarce western water resources which lies at the heart of this case. Most immediately, of course, state efforts to deal with scarce water supplies have provided the genesis of this lawsuit in the form of the Nebraska groundwater law which appellants challenge. More importantly, however, it is the principle of state management of scarce water resources which provides the key to resolving this appeal. As we shall now see, neither the prior decisions of this Court nor the actions of Congress have ever limited state management of scarce water resources in the manner desired by appellants. Indeed, to the contrary, both Congress and this Court have affirmed the principle of exclusive state control over water resources except in several narrow circumstances not pertinent here. Experience—the life of the law according to Justice Holmes[3]—confirms the wisdom of this approach and strongly suggests that appellants' desire for a federalized system of water administration be rejected.

A. The Prior Decisions of This Court Impose Only Two Limitations on a State's Total and Exclusive Authority to Manage Its Internal Waters. Neither of Those Limitations Is Applicable in This Case. Nor Has Congress Sought to Impose Limitations on State Water Management. Indeed, to the Contrary, the Actions of Congress Demonstrate a Long Continued Deference to State Water Law.

To deal effectively with the unique problems created by their scarce water supplies, the Western States separately developed elaborate legal procedures for the allocation of water and the

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3. Holmes, the Common Law, p. 1 (1881); see *California v. United States, supra,* 438 U.S. 645, 648.

adjudication of conflicting water claims. *Colorado River Water Cons. Dist. v. United States, supra,* 424 U.S. 800, 804. Rather than attempting to override the differences in these state procedures through the development of national water management standards grounded upon the Commerce Clause, this Court has consistently recognized the wisdom of administering western water resources at the state level. Indeed, with the exception of two narrow limitations, neither of which is applicable to the groundwater in issue here, this Court has found that a state's authority to manage its internal waters is "total" and "exclusive". *United States v. Rio Grande Dam & Irrig. Co.,* 174 U.S. 690, 702-703 (1899); *California v. United States, supra,* 438 U.S. 645, 622; see also *Hudson Water Co. v. McCarter,* 209 U.S. 349, 356 (1908).

In *California v. United States, supra,* for example, the question considered was whether and to what extent the states could condition the control, appropriation, use or distribution of reclamation water by the United States. In the course of holding that the states could impose conditions not inconsistent with clear congressional directives to the contrary, 438 U.S. 645, 672-675, this Court extensively analyzed the legislative history leading to the enactment of the Reclamation Act of 1902. *Inter alia,* the Court examined a provision added to the Act of Feb. 26, 1897 (29 Stat. 599) which was intended to expressly preserve the States' control over reclamation within their borders. 438 U.S. at 661. After quoting a comment by a Congressman Lacey, which explained that the provision took away "the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of water," this Court reaffirmed a prior decision which outlined the control that could permissibly be exercised by a State over its internal waters:

> "Congressman Lacey's statement found reflection in contemporaneous decisions of this Court holding that, with limited exceptions not relevant to reclamation, authority over intrastate waterways lies with the States. In *United States v. Rio Grande Dam & Irrig. Co.,* for example, New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande River was challenged. The Court

unhesitatingly held that 'as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.' 174 U.S. at 702-703. The Court noted that there are two limitations to the State's exclusive control of its streams—reserved rights 'so far at least as may be necessary for the beneficial uses of the government property.' *id.*, at 703, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters. 'Unquestionably the State . . . has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed.' *Id.*, at 709." 438 U.S. 645 at 662.

In *Hudson Water Co. v. McCarter, supra,* 209 U.S. 349 the Court confirmed the exclusivity of a state's control of its internal waters outside of the reclamation context. There, the State of New Jersey enacted a statute prohibiting persons from exporting the fresh water of the state to another state by means of any pipe, conduit, ditch or canal. After the defendant water company made a contract with the City of New York to supply several million gallons of New Jersey water to one of the City's boroughs, New Jersey brought suit to enjoin the defendant from carrying water out of the state. In the course of affirming a decision of New Jersey's high court which issued an injunction directed at the defendant company, this Court declared:

> "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion

> that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." 209 U.S. at 356.

The cases of *Hudson Water Company, California v. United States* and *Rio Grande* thus make clear that with respect to its internal waters, a state has total and exclusive control subject to two exceptions—reserved rights, so far as those rights are necessary for the beneficial use of property of the federal government, and the navigation servitude. In the case at bench, neither of the exceptions applies. Nowhere does the record disclose that the Nebraska groundwater statute jeopardizes the beneficial use of any federal property; nor is navigability an issue.

Thus, if the Ogallala Aquifer can be considered "internal water" of the State of Nebraska for the purposes of this lawsuit, affirmance would be appropriate under the above-cited authority. Here, the record discloses that the Ogallala Aquifer should be so considered. At page 5 of their Jurisdictional Statement, the appellants concede that,

> "The record shows that groundwater in the Ogallala Aquifer travels under the surface of the earth *from Colorado to Nebraska.*" (emphasis added).

Nebraska, in other words, is a downstream state insofar as the aquifer is concerned, and is in no position to prevent or impair the instream movement of water across state boundaries. In practical

terms then, this case simply involves the regulation by a state of the extraction of groundwater by two of its citizens. In these circumstances, the decisions of this Court plainly hold that the state's authority to so regulate is "total" and "exclusive."

We have heretofore seen that this Court has imposed only two limitations on a State's control of its internal water—the reserved rights doctrine and the navigation servitude. It remains to be seen, however, whether appellants' arguments are supported by the actions of Congress. As this Court recently stated in the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976):

> "It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), 'the power to regulate; that is, to prescribe the rule by which commerce is to be governed.' *Id.*, at 196.
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> "When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that
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> > '"[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.' *Fry v. United States*, 421 U.S. at 542, 547 (1975).
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> Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.' *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 262 (1964)." 426 U.S. at 840.

And as this Court earlier stated in *United States v. Rio Grande Irrig. Co., supra* 174 U.S. 690 in discussing a proposed obstruction to navigability:

> "It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable water within its

> limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, *and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge.* A long list of cases to this effect can be found in the reports of this court."[4] 174 U.S. at 703 (emphasis added).

In light of this authority, it must be aksed whether Congress has acted under the Commerce Clause to assert the general interests of the people of all the States in a way that attempts to override the water rights laws of any individual State. Based upon the most recent opinion of this Court on the subject, this inquiry must be answered in the negative.

This Court's opinion in *California v. United States, supra,* 438 U.S. 645 contains an exhaustive review of congressional legislation touching upon the subject of reclamation of the arid lands of the Western States. In the course of reviewing the Homestead Act of 1862 (12 Stat. 392); the Mining Act of 1866 (ch. 262, 14 Stat. 251); the Desert Land Act of 1877 (ch. 107, 19 Stat. 377); the acts of Oct. 2, 1888 (25 Stat. 327), Aug. 30, 1890 (26 Stat. 391), Mar. 3, 1891 (26 Stat. 1101) and Feb. 26, 1897 (ch. 335, 29 Stat. 599) and; finally the Reclamation Act of 1902 (32 Stat. 388), this Court firmly declared the following:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but

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4. This Court found such an assertion of Congressional power in *Rio Grande* in the form of Congress' enactment of a precursor to the Rivers and Harbors Act which provided that, "the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." 174 U.S. at 707-708. According to the Court, this language meant that thereafter no State approved water appropriation would be allowed where such appropriation, "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *Id.* at 708.

through it runs the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. 645 at 653.

Nor has Congress altered its purposeful and continued deference to state water law in the years which have intervened since passage of the Reclamation Act of 1902. In the course of adopting its most recent amendments to the Federal Water Pollution Control Act, Congress added Section 101(g) to the Act which states as follows:

> "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

The amendment was originally introduced by Senator Wallop who explained its purpose in the following way.

> "MR. WALLOP. Mr. President, this is a simple amendment and I shall not take much time on it. I have talked with the managers of the bill on both sides and I believe they will accept it.
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> "The amendment simply states that nothing in the act shall be construed to supersede or abrogate or in any other way 'affect any authority now vested in any State to establish or operate programs for the allocation of quantities of water within its respective boundaries, or any rights to or allocations of quantities of water which have been established pursuant to such program.
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> . . .
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> "It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed.

"The amendment speaks only—but significantly—to the rights of States to allocate quantities of their water and to locate quantities of their water and to determine priority uses. It recognizes the differences in types of water law across the Nation. It recognizes patterns of use.

"When Wyoming became a State and the Congress ratified our Constitution in the Act of Admission, that Constitution stated then and states today, 'The water of all natural streams, springs, or lakes or other collections of still water within the boundaries of this State are hereby declared to be the property of the State.'

"Water quality and interstate movement is an acceptable Federal role and influence. But the States historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment."

(Remarks of Sen. Wallop, 123 Cong. Rec. 13606 (daily ed. August 4, 1977).)

Quite clearly, Congress has *not* attempted to assert the general interests of the people of all the States in a way that attempts to override the water rights laws of any individual States. Indeed, it has pointedly done just the opposite. Wherever its enactments might conceivably be construed as limiting the historic right of the States to regulate the use and distribution of water within their jurisdiction, Congress has taken care to make certain that its enactments are *not* so construed. In short, the actions of Congress —like the prior opinions of this Court—fail to provide any support for appellants' Commerce Clause arguments. As we have seen, the actions of Congress, in fact, severely undercut appellants' assertions.

B. Disputes Over Rights to Interstate Waters Are Determined Through Application of the Doctrine of Equitable Apportionment, Not the Commerce Clause.

We have argued hereinabove, that the opinion of the Nebraska Supreme Court should be affirmed since the prior opinions of this Court impose only two limitations on a state's total and exclusive authority to manage its water resources, neither of which is applicable here. The opinions relied upon hereinabove refer to the

administration of a state's internal waters and, as we have argued, the waters of the Ogallala Aquifer should be viewed as the internal waters of Nebraska for the purposes of this case. Assuming *arguendo* that the waters of the Ogallala Aquifer are not so viewed and, instead, are treated as interstate waters, appellants' Commerce Clause contentions nonetheless remain wide of the mark. In such circumstances, interstate water disputes are not resolved by the application of Commerce Clause principles, but rather by application of the doctrine of equitable apportionment.

Where water flows from one state into another and is used beneficially in both, it must be equitably apportioned between the two. *Hinderlider v. La Plata Co.* 304 U.S. 92, 101 (1937); *Kansas v. Colorado* 206 U.S. 46, 97 (1907); *Wyoming v. Colorado* 259 U.S. 419, 466 (1922). In *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) the Court explained what equitable apportionment means:

> "As was shown in *Kansas v. Colorado*, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system' *and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts,* this Court will determine what is an equitable apportionment of the use of such waters." 282 U.S. 660 at 670-671. (emphasis added).

In *Nebraska v. Wyoming* 325 U.S. 589 (1945), the Court elaborated upon the "other relevant facts" that would be considered in effectuating an equitable apportionment:

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is

> imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interest which must be made." 325 U.S. 59 at 618.

Effectuation of an equitable apportionment of state waters thus involves a consideration of pertinent *state* laws of the contending states and an evaluation of relevant *physical facts* which tilt the equities to one state or the other. Nothing in the equitable apportionment opinions of this Court suggests that federal common law principles developed under the Commerce Clause have any role whatsoever in the equitable apportionment decision.

The case at bench, of course, involves not competing states, but rather a downstream state and a resident of that state who seeks to take water from that state to an upstream state, thus effectively increasing the upstream state's share of the water. This distinction in no way alters the foregoing conclusions about the inapplicability of the Commerce Clause. It does, however, raise considerable question about appellants' ability to maintain this lawsuit at all. In *Hinderlider v. La Plata Co., supra* 304 U.S. 92, this Court held that a water user in one state cannot acquire rights, as against users in other states, that exceed the entire apportionment of the state in which his rights are exercised; his rights are circumscribed by the rights of the latter state.[5] 304 U.S. 92, 102. Therefore, he cannot sue users in the other state—or the other state itself—to establish his rights; otherwise, he may be able to acquire rights that *do*

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5. In *Hinderlider,* a private water user in Colorado, sued the Colorado State Engineer for an injunction restraining the continued flow of interstate waters to downstream users in the State of New Mexico. The plaintiff asserted that his rights were paramount to the rights of users in New Mexico. Therefore, it was argued, the State Engineer could not lawfully comply with an interstate compact, signed by Colorado and New Mexico, apportioning the waters between the two states. The Supreme Court rejected the suit. It ruled that the State of Colorado acts in a *parens patriae* capacity on behalf of all non-federal water users in Colorado when it obtains an equitable apportionment of interstate waters between the states; that a private water user in Colorado can thus acquire no greater right than that held by Colorado acting on behalf of Colorado users; and thus that the plaintiff cannot enjoin Colorado from delivering water to New Mexico consistently with the apportionment.

exceed the entire apportionment of the state in which his rights are exercised.[6]

Stated differently, under *Hinderlider,* a water user's rights exist only in relation to competing rights in the state of intended use; they do not exist in relation to rights in other states. Since the user's rights exist only in relation to rights in the state of intended use, the user cannot sue other states to establish his rights. That task belongs to the state of intended use which may establish such rights on behalf of its water users either by interstate compact or by an equitable apportionment suit brought in this Court against the competing state. *Hinderlider,* 104-106. As applied here, this means that appellants' remedy lies not in the maintenance of the case at bench; rather, it lies in persuading the State of Colorado to enter an interstate compact with Nebraska which equitably apportions the Ogallala Aquifer in a manner that enables appellants to extract water in Nebraska for application upon Colorado lands or, failing that, in persuading Colorado to bring an equitable apportionment suit in this Court which will achieve a similar result.

Thus, to sum up, even if the groundwater which appellants seek to extract and apply in another state is viewed as interstate water rather than the internal water of Nebraska, it is apparent that the Commerce Clause is not the final arbiter of the propriety of

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6. This common law rule was also applied in *Arizona v. California,* 33 U.S. 546 (1963), where the Supreme Court apportioned the interstate waters of the lower Colorado River between Arizona and California pursuant to the Boulder Canyon Project Act, 43 U.S.C. § 617. The United States asserted various water rights in the river for the purpose of serving the needs of Indian reservations, national forests, national wildlife refuge areas, and other kinds of federal property. 373 U.S. at 600-601. The Court, in apportioning water for these federal uses, ruled:

> "[A]ll uses of mainstream water within a State are to be charged against that State's apportionment, which of course include uses by the United States." *Id.* at 601.

Thus, the Court ruled that the United States' uses are charged against the apportionment of the state in which the uses occur, not against the apportionment of other states. In short, the United States can only obtain an apportionment of water as against competing users in the state of intended use, not against other states or their users. This result supports the conclusion that appellants' rights exist only in relation to competing rights in the same state.

Nebraska's regulatory efforts. Instead, the water is subject to equitable apportionment in this Court; a process which involves a consideration of *state* law and other relevant *physical facts*, not federal Commerce Clause principles. Further, such a process may not be evaded by users filing suit against competing states or their users; rather, it must be followed by competing *states* acting in a *parens patriae* capacity on behalf of their users.

C. Acceptance of Appellants' Commerce Clause Arguments Would Directly Displace the Western States' Freedom to Structure Integral Operations in Areas of Traditional Governmental Functions.

Implicit in the long-continued deference of this Court and Congress to state water resource management, is the realization that water is unique among the resources of the arid Western States. Where there is water, there are homes and farms and businesses. Where water is lacking, there exists no social or economic structure—only bare land. In California, these unarguable facts prompted the state's Supreme Court to recently reconfirm the following statement, first expressed some 50 years ago:

> "The present and future well-being and prosperity of the state depend upon the conservation of its life giving waters.
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> . . .
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> "It requires no extraordinary foresight to envision the great and increasing population of the state and its further agricultural and industrial enterprises dependent upon stored water—water that is now wasted into the sea and lost to any beneficial use. *The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance.* Its waters are the very lifeblood of its existence."
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> *Joslin v. Marin Mun. Water District* 67 Cal.2d 132 at 140 (1968), quoting from *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 701-702 (1933) (emphasis in original).

The essence of the above statement has been repeated throughout the constitutions, statutes and judicial decisions of the other

Western States, all of which recognize the unique importance of water to their existence as states.[7]

The significance of the fact that water is unique and directly concerns the very existence of the Western States is made apparent by this Court's opinion in *National League of Cities v. Usery, supra* 426 U.S. 833. In *Usery,* state and local governments challenged congressional amendments which extended the Fair Labor Standards Act to state and local government employees. The Federal Government argued that the Commerce Clause provided Congress with the necessary constitutional authority to adopt the amendments. This Court disagreed and stated:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. In *Coyle v. Oklahoma,* 221 U.S. 559 (1911), the Court gave this example of such an attribute:
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> > 'The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained.' *Id.,* at 565.
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> "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided when these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are ' "functions essential to separate and independent existence." ' *id.,*

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7. See, for example, Nebr. Const., art. XV, § 4; Wyoming Constitution, art. I, § 31; Tex. Const., art. XVI, § 59(a); Calif. Const., art. X, § 2; S. Dak. Code § 61.0101 (1939), as reenacted by Laws 1955, ch. 430, now Comp. Laws Ann. § 46-1-4 (1967); *Tanner v. Bacon,* 103 Utah 494, 508, 136 Pac.2d 957 (1943); *Pima Farms v. Proctor,* 30 Ariz. 96, 102, 112-113; 245 Pac. 369 (1926); *Worden v. Alexander,* 108 Mont. 208, 90 Pac.2d 160 (1939).

at 580, quoting from *Lane County v. Oregon, supra,* at 76, so that Congress may not abrogate the States' otherwise plenary authority to make them." 426 U.S. 833 at 845-846.

The Court then concluded as follows:

"We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions' they are not within the authority granted by Art. I, § 8, cl. 3." *Id.* at 852.

In the arid Western States, the allocation of scarce water resources and the adjudication of conflicting claims to water are well within the area of traditional operations of state governments.[8] Indeed, this Court expressly noted the continuous deference by Congress to the exercise of such functions by the Western States, in its opinion in *California v. United States,* 438 U.S. 645, 653. If appellants' Commerce Clause contentions are adopted, they would manifestly displace the State's freedom to structure these functions. They would effectively federalize an area of state governmental operation that is essential to the very existence of the Western States and that has traditionally been within the authority of those states. The teaching of *Usery,* however, is that the powers of the Commerce Clause do not extend that far. If Congress may not utilize the Commerce Clause to displace the States' authority in areas of traditional governmental functions, then *a fortiori* the appellants may not use Art. I, § 8, cl. 3 in that fashion. Accordingly, this Court should reaffirm, that with the exception of federal reserved rights and the navigation servitude, the power of the states to allocate the waters within their borders and resolve conflicting claims to those waters is absolute.

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8. In *Usery,* the Court identified such activities as fire prevention, police protection, sanitation, public health and parks and recreation as being "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 85. It also went on to state:

"These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* for 16.

D. Appellants' Commerce Clause Arguments, if Accepted, Would Render the Sophisticated Water Rights Systems Developed by the Western States, Virtually Unworkable.

As noted earlier, a number of the Western States have developed elaborate and comprehensive procedures for allocating water and adjudicating conflicting claims to water resources. *Colorado River Water Cons. Dist. v. United States, supra,* 424 U.S. 800, 804. In a recent analysis of the McCarran Amendment (43 U.S.C. § 666) this Court itself recognized that the consent to jurisdiction over the United States given by the amendment "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights . . ." *Colorado River, supra,* 424 U.S. 800, 819. Those state systems, noted the Court, provide the means for achieving such goals as the avoidance of inconsistent dispositions of property and the avoidance of piecemeal adjudications of water rights—which the Court recognized to be "highly interdependent." *Id.*

The "elaborate" character of the water allocation and adjudication procedures developed by the Western States is dictated to a large extent by the issues those procedures are designed to handle. California's Supreme Court, for example, has stated that,

> "The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts."
> *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183 at 194.

Lawyers familiar with the kind of litigation that disputes over water can generate, would not be inclined to disagree.

Presently, the elaborate water allocation mechanisms developed by the Western States are able to deal effectively with the complex water resource management issues which arise in the West. If appellants' Commerce Clause arguments are adopted, however, these elaborate state mechanisms would be rendered unworkable. In no small way, this consequence would result from the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." See *Cali-*

fornia v. United States, supra, 438 U.S. 645, 668-669. If appellants' arguments are adopted, an intricate, dual system of water law would be imposed on each and every locality in this country.

First, appellants' arguments would create a dual system of water rights with respect to interstate and intrastate water sources. Under their theory, the propriety of a diversion or extraction of water from an interstate source would be determined by the Commerce Clause, not by the water rights mechanism of the state in which the diversion or extraction is made. Thus, the Commerce Clause could be used to create a right to divert and transfer water from an interstate source that might be denied under the state's own water right mechanism to a diverter from an intrastate source. Rational water use planning would be dealt a severe blow in such event since the validity of the diversion from the interstate source would not be known until the Commerce Clause was applied in the courts.

Nor would the problems created by a dual system of law be limited to interstate streams. Under appellants' theory, the Commerce Clause not only controls one's right to divert from an interstate stream; it also controls the right to divert or extract water from a wholly *intrastate* source where the water diverted or extracted is used to produce products that are items of interstate commerce. (Appellants' Jurisdictional Statement, p. 11-12). Thus whether federal or state law controlled the diversion or extraction of water would depend not only upon whether the source of water was intrastate or interstate in character, but also upon whether the *destination* of the crop or other commodity produced by the water was intrastate or interstate. Put in concrete terms, a San Joaquin Valley grower unhappy with state-mandated water use restrictions could simply shift crops from alfalfa intended for local consumption to cotton intended for interstate shipment and challenge the state restrictions as violations of the Commerce Clause. In these circumstances, rational water policy would be impossible to devise and implement.

Unfortunately, the legal confusion created by the adoption of appellants' arguments is not limited to the foregoing. In California, the state itself has constructed a massive system of dams,

canals and pumping plants known as the State Water Project ("SWP"). By storing surplus winter and spring flows from the Sacramento River and its tributaries and releasing that water during the drier months, the SWP creates a large supply of water which the state markets to more than a score of agricultural and municipal water wholesalers. The water is then resold for use in thousands of farming and business operations producing a variety of products shipped in interstate commerce. Under appellants' arguments, this water would be controlled by the Commerce Clause. The recent opinions of this Court, in *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) suggest to the contrary, however, that conditions imposed by the State on the use of such water would be exempt from review under the Commerce Clause since the State is acting in these circumstances as a market "participant" rather than a market "regulator".[9]

If a state's operation of its own water development and delivery system is exempt from the restrictions of the Commerce Clause,

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9. In the cases of *Hughes v. Alexander Scrap Corp.* and *Reeves, Inc. v. Stake*, this Court created an exception to the restrictions of the Commerce Clause where a state affects trade by entering into the flow of commerce as a market participant rather than a market regulator. In *Hughes*, the State of Maryland sought to reduce the number of abandoned vehicles within the state by providing a monetary bounty to automobile wreckers and scrap processors. The purpose of the bounty was to encourage the movement of vehicles from the wrecking company junk yards to the scrap processing plants. While the Maryland statute did not prohibit the participation of out-of-state scrap processors, the statute did impose a greater documentation burden on out-of-state processors than it imposed on Maryland processors. Thus, Maryland scrap processors more easily obtained the monetary bounty from the program and therefore received a competitive advantage over their out-of-state counterparts.

The out-of-state processors challenged the Maryland program alleging that the unequal documentation requirement was an unconstitutional burden on interstate commerce. The court in *Hughes*, however, distinguished the Maryland program from previous Commerce Clause cases by finding that:

> "The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the

as *Hughes* and *Reeves* suggest, however, then appellants' arguments would engender "legal confusion" in yet another way. Not

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conditions under which it may itself to bid up their price." (*Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 807 (1976)).

It further declared:

> "But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the state." (*Hughes, supra* at 808.)

The court therefore concluded that,

> "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." (*Hughes, supra* at 810).

Thus, where a state is a market participant, the *Hughes* court indicated that state conduct may not be limited by the Commerce Clause even though a burden on commerce may result.

In *Reeves, Inc. v. Stake*, this Court further elaborated on the "market participation" exception enunciated in *Hughes*. (*Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)). At issue in *Reeves* was a cement plant owned and operated by the State of South Dakota. Unable to meet the demand for the plant's product, the South Dakota Cement Commission set a "policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis." (*Reeves, supra* at 432-33). Reeves, Inc., a Wyoming based cement buyer, challenged South Dakota's decision, arguing that the home state preference policy was an unconstitutional burden on interstate commerce.

Relying on its decision in *Hughes v. Alexander Scrap*, this Court upheld the South Dakota preference policy. It declared that the inherent restrictions of the Commerce Clause did not apply to the operation of the South Dakota cement plant:

> "The basic distinction drawn in *Alexander Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *Id.*, at 807-808, citing *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949) (referring to "home embargoes," "customs duties," and "regulations" excluding imports). There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. See L. Tribe, *American Constitutional Law* 336 (1978) ("the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity"). The precedents comport with this distinction." (*Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980)).

Thus the Court sought to distinguish the situation where the state acts as a "political entity" and where it acts as a "private business." When the states act as "proprietors" they are free from the "inherent limits of the Commerce Clause." (*Reeves, supra* at 439).

only would the applicable water law (federal or state) depend upon the intra or interstate character of the water source; not only would it depend upon the destination of the product produced with the water; it would also depend upon whether the water was supplied by the state itself entering the water market as a participant or as a regulator.

The impossibility of administering a water rights system that invokes differing laws under such a bewildering set of circumstances is obvious. Considering the breakdown in water resouce administration that would almost certainly result, it is wise to consider again the words that were recently endorsed by this Court in *California v. United States, supra,* as "[p]erhaps the most eloquent expression of the need to observe state water law . . ."

> "In the arid Western States, for more than 80 years, the law has been the water above *and beneath* the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is invested with the primary control thereof.
>
> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States must be amenable to the law of the State if there is to be a proper administration of the water law as it has developed over the years." 438 U.S. 645 at 670-679, quoting from S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951) (emphasis added).

CONCLUSIONS

For all of the foregoing reasons, the judgment of the Supreme Court of Nebraska should be affirmed.

DATED: February 10, 1982

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1981

JOY SPORHASE AND DELMER MOSS
INDIVIDUALLY AND AS REPRESENTATIVES OF
SPORHASE AND MOSS,

Appellants,

vs.

STATE OF NEBRASKA EX REL.
PAUL L. DOUGLAS, ATTORNEY GENERAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

BRIEF OF AMICI CURIAE STATES OF COLORADO, WYOMING, UTAH, NEVADA, KANSAS, NORTH DAKOTA, SOUTH DAKOTA, AND MISSOURI

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QUESTION PRESENTED

Does a state statute prohibiting the export of ground water outside the territorial boundaries of the state violate the commerce clause of the United States Constitution?

TABLE OF AUTHORITIES

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Lukey, Gutentag and Weeks, Hydrologic Investigations, Atlas HA-652 (Sheet 1082), U.S.G.S. 1981 3

STATEMENT OF INTEREST OF AMICI CURIAE

No problem in the arid west is more critical than the scarcity of water. The importance of water to the west was immediately apparent:

> The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates.

Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882).

Competing demands for scarce water resources have required the equitable apportionment of interstate waters. *E.g.*, The Colorado River Compact, approved by Congress in § 13 (a) of the Boulder Canyon Project Act, 45 Stat. 1064, 43 U.S.C. § 617l; *Arizona v. California*, 373 U.S. 546 (1963) (opinion), 376 U.S. 340 (1964) (decree); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (opinion), 325 U.S. 665 (1945) (decree). These arid states are now experiencing unprecedented growth in population and increasing demands upon their limited water supplies.

The controversy before the court involves the constitutionality of a state statute which prohibits the transportation of ground water for use outside the state except in limited circumstances. The appellants argue that ground water should be treated the same as other natural resources, such as coal, gas, or oil. Brief of Appellants at 14. They contend that *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), is an "antiquated case, . . . fleeting and nebulous at best," *id.* at 17, and that Nebraska's "parochial legislative policies" should not be allowed to burden the free flow of ground water between the states. *Id.* at 18.

The amici states have enacted laws limiting or prohibiting the export of water for use outside the boundaries of the state.[1] These statutes are consistent with equitable apportionment decrees of this court and are necessary to implement interstate compacts consented to by Congress. Implicit in all compacts apportioning interstate waters, and explicit in some, is the assumption that each state may prohibit the diversion of apportioned waters for use outside its boundaries. These compacts, which this court has strongly encouraged, *e.g., Colorado v. Kansas*, 320 U.S. 383, 392 (1943), were entered into subsequent to, and in reliance upon, the decision in *Hudson County Water Co. v. McCarter, supra.*

The amici states appeal to the court to recognize that water, unlike coal, gas, or oil, is a fundamental necessity without which human life cannot exist. Legislative prohibitions on the export of water are essential to preserve viable economies in the arid west, upon which the sovereignty of the states ultimately depends.

Other states even though in traditionally water rich area are faced with proposals for large scale exportation of water. These proposals envision the export of enormous quantities of water beyond state borders. If a state cannot effectively regulate such diversions, this most precious natural resource, water, may be squandered as every interest rushes to defeat the real and substantial interest of the state in protecting the welfare of its citizens.

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[1] *E.g.*, Colo. Rev. Stat., 1973, 37-81-101, 103 (1981 Cum. Supp); Colo. Rev. Stat., 37-90-136; Wyo. Stat., 41-3-105; 41-3-115, (a), (b), (c). Other western states such as Nevada do not absolutely prohibit export of water, but assert in their statutes the right to deny a water permit on the grounds that export would be in some circumstances detrimental to the interest and welfare of the state. *See, e.g.*, Nev. Rev. Stat. 533.370(1), (4).

STATEMENT OF THE CASE

The appellants, Joy Sporhase and Delmer Moss, own a well located near the Nebraska-Colorado state line. At some time after February, 1972, the appellants began irrigating land in Colorado with water diverted from the Nebraska well. In 1977, the Nebraska Attorney General filed a complaint against the appellants seeking a permanent injunction restraining them from transporting ground water pumped from the Nebraska well outside the state in violation of state law. The appellants challenged the constitutionality of the Nebraska statute, a challenge which was rejected by the Nebraska courts.

An important fact, which was not brought out in the courts below, is that appellants had applied to the Colorado Ground Water Commission to appropriate ground water to irrigate their land in Colorado.[2] The application was denied on August 23, 1977, on the grounds that the aquifer at the proposed location was overappropriated and that granting the permit would injure other appropriators in Colorado.

There are other facts which the court should consider. The appellants' well withdraws ground water from the Ogallala aquifer. The Ogallala aquifer underlies eight states: Colorado, Wyoming, South Dakota, Nebraska, Kansas, Texas, Oklahoma and New Mexico.[3] Within the high plains region of these states, the aquifer is the principal source of water for irrigation and, to a lesser extent, for municipal and domestic use.[4]

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[2]Colorado Ground Water Commission file No. AD-6826.

[3]Lukey, Gutentag and Weeks, Hydrologic Investigations Atlas HA-652 (sheet 1 of 2), U.S.G.S. 1981.

[4]High Plains Study Council, Six-State High Plains — Ogallala Aquifer Resources Study: Preliminary Draft Report to Congress (January, 1982) at I-1; *see also* High Plains Study Council, Six-State High Plains — Ogallala Aquifer Resources Study: Congressional Briefing [Paper] (February 25, 1981).

Prior to World War II the economy of the high plains region was based primarily on dryland farming and livestock grazing.[5] Ground water pumping from the Ogallala aquifer for irrigation began in the 1930's and then rapidly expanded.[6] Irrigated acreage in the area increased from less than 3.5 million acres in 1950 to more than 15 million acres in 1980.[7] By 1977 the region was supplying nearly 38 percent of the national production of grain-fed beef.[8] Production of feed grain crops grew from less than 150 million bushels in 1950 to more than 1.25 billion bushels in 1980.[9]

The increased ground water withdrawal has resulted in a steady, and in some cases, rapid depletion of water economically recoverable from the aquifer. The most severe water level declines have been in the states of Texas and Kansas which are located on the fringes of the aquifer where there is less saturated material from which the water may be withdrawn.[10] The decline in water levels poses a severe threat to the existing economies of certain states in the high plains region. Projections based on current levels of water use for the year 2020 reveal grim statistics: some 5,100,000 acres currently irrigated will be returned to dryland farming.[11] This amounts to a reduction in irrigated acreage in Colorado of 43 percent, a reduction in Kansas of 75 percent, a reduction in New Mexico of 43 percent, and a reduction in Texas of 61 percent.[12] At the same time, the projections show a considerable increase in irrigated acreage in Nebraska.[13]

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[5] *Id.*

[6] *Id.*

[7] *Id.* at I-1 to I-3.

[8] *Id.* at I-3.

[9] *Id.*

[10] *Id.* at I-4.

[11] *Id.* at V-2.

[12] *Id.* at V-4. In recognition of the seriousness of the problem, Congress has directed a study of the problem. Pub. L. 94-587 § 193. *See* note 4 *supra*.

[13] *Id.*

Most of the states overlying the aquifer have enacted ground water conservation legislation to control the rate at which the resource is depleted and to protect the rights of existing water users.[14] For example, Colorado has limited depletion of the aquifer in its Northern High Plains Designated Ground Water Basin to 40 percent depletion within a 25 year period.[15] New well permits are denied if ground water use would exceed that rate. Each of these states prohibits the export of ground water outside the territorial boundaries of the state, except in narrowly limited circumstances.[16]

I.

Limitations on the export of water outside the territorial boundaries of a state are consistent with decrees entered by this court equitably apportioning the waters of interstate streams.

In *Kansas v. Colorado*, 206 U.S. 46 (1906), this court held that its original jurisdiction extended to actions between states to determine their relative rights to the use of interstate waters. Based on the "cardinal rule" of equality of right between states, the court held that both Colorado and Kansas were entitled to an equitable apportionment of the benefits of the waters of the Arkansas River. The doctrine of equitable apportionment was eloquently described by Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342-343 (1931):

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must

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[14] *E.g.*, Colo. Rev. Stat., 1973, 37-90-101 *et seq.*; Wyo. Stat., 41-3-901 *et seq.*; Kan. Stat. Ann. 82a-1036, 1037, 1038 (1980 Cum. Supp).

[15] *Thompson v. Colorado Ground Water Comm'n*, 194 Colo. 489, 575 P. 2d 372 (1978); *Fundingsland v. Colorado Ground Water Comm'n*, 171 Colo. 487, 468 P. 2d 835 (1970).

[16] *See* note 1 *supra*.

> be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas. (citations omitted.)

Equitable apportionment of interstate waters is based on "the equal level or plane on which all the states stand, in point of power and right, under our constitutional system." *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922). As "quasi-sovereignties bound together in the Union," each state has a "real and substantial interest" in water as a "necessity of life." *New Jersey v. New York, supra*, 283 U.S. at 342.

Implicit in each of the equitable apportionment decrees entered by this court is that states have the exclusive right to use the waters so apportioned. This is clearly illustrated by the 1957 consent decree entered in *Wyoming v. Colorado*, 353 U.S. 953 (1957). In that decree, Colorado was enjoined from diverting more than a total of 49,375 acre-feet of water from the Laramie River and its tributaries. Of this amount, no more than 19,875 acre-feet could be diverted for "use in Colorado at any point outside of the [Laramie River] basin." The remainder of the water apportioned to Colorado, including any of the 19,875 acre-feet not diverted out of basin, was limited to use on lands in Colorado specified in the decree.

Such decrees would be meaningless if a state could not prohibit the export outside the boundaries of the state of the waters so apportioned to it. Absent anti-export statutes, citizens of a state needing more water than apportioned to their state could acquire water rights in waters apportioned to another state and then export the water back across the state line. Such a result would defeat the very purpose of an equitable apportionment. *Weiland v. Pioneer Irr. Co.*, 259 U.S. 498, 502-503 (1922). *Cf. Arizona v. California*, 373 U.S. 546 (1963).

II.

Limitations on the export of water outside the territorial boundaries of a state are essential to implement interstate compacts apportioning waters.

In 1908 this court upheld the right of a state to prohibit the diversion of water for use outside its boundaries. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). The principal rationale of the decision was that states as quasi-sovereigns have substantial interests in "one of the great foundations of public welfare and health." 209 U.S. at 356 (Holmes, J.).

Subsequent to that decision, and in reliance upon it, many states entered into compacts to equitably apportion interstate waters. The overriding purpose of these compacts was to eliminate present and future controversies between the states. Implicit in all these compacts, and explicit in some, is the assumption that the states may limit the use of waters so apportioned to use within their boundaries.

For example, in the Colorado River Compact, approved by Congress in the Boulder Canyon Project Act, 45 Stat. 1057, 1064, 43 U.S.C. § 617*l*, the waters of that river system were apportioned between the upper and lower basin states. The compact apportions, in

perpetuity, the *exclusive beneficial use* of 7,500,000 acre-feet each to both the upper and lower basin states. By this provision, known as the "Hoover Compromise," the states have apportioned the waters of the river between the upper and lower basin and have excluded states of the upper basin from making any claim to water apportioned to the lower basin and vice-versa. *Arizona v. California*, 373 U.S. 546, 555-556 (1963). This apportionment would never have been reached if the states of each basin were not entitled to the exclusive use of the waters equitably apportioned.

The states of the upper basin have, by compact, further apportioned their share of Colorado River water among themselves. In article III of the Upper Colorado River Compact, 63 Stat. 31, each state is allocated, in perpetuity, the consumptive use of a certain portion of the water available to the upper basin states. Under article III(b)(3) of this compact, no state may exceed its apportioned use at any time when the effect would be to deprive another signatory state of its apportioned use. This provision of the compact clearly contemplates that each state is entitled to the exclusive use of those waters apportioned to it when needed by it. If a state could not constitutionally limit the export of waters apportioned to it, this provision would be unenforceable and the compact would fail in its essential purpose.

Other compacts approved by Congress have express provisions prohibiting or limiting the export of water. Article X of the Yellowstone River Compact, 65 Stat. 653, provides that no water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states. Similarly, article IV of the Snake River Compact, 64 Stat. 29, between Wyoming and Idaho prohibits Wyoming from exporting water out of the Snake River drainage without the consent of Idaho and prohibits Idaho from exporting waters out of the Salt River draingage without the consent of Wyoming. By approving such compacts

Congress has recognized and expressly approved provisions which, by their own terms, prohibit the export of water. It has done so in recognition that prohibitions on export of water are a necessary and desirable part of the interstate allocation of precious water resources.

These interstate compacts were entered into by the states on the assumption, supported by a decision of this court, that a state could prohibit the diversion of water for use outside its boundaries. For example, Article VII of the Snake River Compact allows each signatory state the right to construct such dams, reservoirs, or other diversion facilities in the other states as are necessary to allow it to conserve and regulate the water allocated to it. However, in doing so each state must comply with the laws of the other state *except* those pertaining to limitations by one state on the diversion or storage of water for use outside that state. This exception applies only to waters allocated by compact to the state which seeks to import them.

By including such provisions in interstate compacts, the states expressly assumed that they may limit or prohibit the diversion of water for use in another state. Congress has acted to strike the balance it deems appropriate by approving such interstate compacts. Shifting theories of constitutional law ought not to upset agreements so fundamental to our federal system, particularly when this court has so strongly encouraged the use of compacts to equitably apportion interstate waters. *E.g., Colorado v. Kansas*, 320 U.S. 383, 392 (1943).

III.

Limitations on the export of ground water are necessary to prevent an accelerated depletion of the Ogallala Aquifer.

The foregoing review of decrees of this court and interstate compacts equitably apportioning interstate waters illuminates the problem in this case. At present, there is a *de facto* equitable apportionment of ground water in the Ogallala Aquifer. Each state overlying the aquifer allocates for beneficial use only that quantity of ground water which can be diverted within the state. If this court were to strike down the Nebraska statute prohibiting the export of ground water, the effect would be immediate. Water users in states located on the rim of the aquifer who have an inadequate supply, as in Colorado, would apply for permits to construct wells in Nebraska to export ground water. The effect would be to hasten depletion of the aquifer. Equitable apportionment, by decree or compact, would be the likely result. *See Weiland v. Pioneer Irr. Co., supra,* 259 U.S. at 502-503; Republican River Compact, Art. V, 57 Stat. 86 (1943).

CONCLUSION

The economies of many states hinge upon the decision of the court in this case. The amici states appeal to the court to recognize the fundamental difference in law and in life between natural resources such as coal, gas, or oil, and water — a "necessity of life that must be rationed among those who have power over it." *New Jersey v. New York, supra,* 283 U.S. at 342. The power to allocate water is an essential attribute of state sovereignty. The inescapable reality in the arid west is that there is only enough water to irrigate a small fraction of the lands which might be reclaimed with an adequate supply of water. Most of the states of the west have seen fit to enact anti-export statutes because they understand that demands for water constantly exceed the available supply, and that such limitations are necessary to protect their real and substantial interest in an equitable apportionment of interstate waters. Congress, by approving compacts which explicitly or implicitly recognize the right of states to prohibit the export of apportioned water, has acknowledged that such statutes do not burden interstate commerce. This

Court should not strike down a statute which is essential for a state to protect its interest in "one of the great foundations of public welfare and health." *Hudson County Water Co. v. McCarter*, *supra*, 209 U.S. at 356.

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No. 81-613

In The
Supreme Court of the United States
October Term, 1981

JOY SPORHASE AND DELMER MOSS, *Appellants,*

v.

STATE OF NEBRASKA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF THE ELEPHANT BUTTE IRRIGATION DISTRICT, CARLSBAD IRRIGATION DISTRICT, ARCH-HURLEY CONSERVANCY DISTRICT, AND MIDDLE RIO GRANDE CONSERVANCY DISTRICT AS AMICI CURIAE

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No. 81-613

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JOY SPORHASE AND DELMER MOSS, *Appellants*,

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STATE OF NEBRASKA, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF THE ELEPHANT BUTTE IRRIGATION DISTRICT, CARLSBAD IRRIGATION DISTRICT, ARCH-HURLEY CONSERVANCY DISTRICT, AND MIDDLE RIO GRANDE CONSERVANCY DISTRICT AS AMICI CURIAE

The Elephant Butte Irrigation District, Carlsbad Irrigation District, Arch-Hurley Conservancy District, and the Middle Rio Grande Conservancy District respectfully submit this brief as amici curiae. Consent from the parties is filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

This case involves what is, relatively speaking, a cup full of water. There is presently pending decision after trial in the federal district court of New Mexico the case of *El Paso v. Reynolds*, Civil No. 80-730 HB, in which El Paso seeks to invalidate a New Mexico limitation on exports of groundwater in the hope that such an invalidation will pave the way for the extensive transfer of groundwater from New Mexico to Texas. The amounts of water involved in the *El Paso v. Reynolds* controversy are not a cup full; El Paso has staked out water claims in New Mexico which are larger

than the entire amount of water which the City of Phoenix, for example, will get from the Colorado River under *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963).

There are other issues in the *El Paso v. Reynolds* case that are not present in this case, but the determination of the questions in this case will have very large consequence on at least some of the issues in *El Paso v. Reynolds*. One amicus here, Elephant Butte Irrigation District, is a party in the New Mexico litigation and believes its existence to be directly at stake there. El Paso has filed an amicus brief in this case, and Elephant Butte Irrigation District would counter with the brief here presented.[1] The other irrigation districts could well be adversely affected by this decision. Collectively they represent the major New Mexico water interests.

The "question presented" as offered by El Paso is materially different from the first question presented as offered by the appellant. The latter is, of course, controlling; R. Stern, *Appellate Practice in the United States*, 268 (1981). We adhere to the question on which probable jurisdiction was noted and restrict ourselves to question 1, which is whether the Nebraska statute prohibiting the interstate transportation of groundwater, conditioned upon reciprocity, imposes an undue and unreasonable burden upon interstate commerce in violation of the Commerce Clause.[2] The second question presented, whether such a statute violates the Due Process or the Equal Protection Clause, we regard as so insubstantial that we abstain from discussion here. The central question of this case, going to

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[1] El Paso has seen fit, rather overtly, to argue their district court case in their brief in this case. With all respect for their decision on this point, we think it better not to do this and abstain.

[2] We do not discuss the specialized aspects of reciprocity, *cf. Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976), since in the view we advance as to the plenary authority of the state over its groundwater, the subsidiary detail of reciprocity is immaterial.

the means by which the states can deal with the shortage of water in the arid west for their part and future needs, is whether the Commerce Clause limits the state power.

ARGUMENT

I. *In Those States Which Take a "Public Ownership" Approach to Their Groundwater, the Disposition of That Water is not Subject to the Commerce Clause.*

A. *Water, Having Been Consigned to the States, Does not Ever Become an "Article of Commerce" in Those States Which do not Permit Private Ownership.*

If a state may not restrict the exportation of percolating natural gas, *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), why can that state restrict percolating natural water? If a state may not restrict the sale of natural minnows from a stream, *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), why can it restrict the water in which the minnows swim?

The answer lies in the special regulated position of water, particularly in the arid states. This special position is illustrated by two considerations: First, unlike natural gas or minnows, which when "reduced to possession" are owned without limitation, groundwater is "owned" by the state or the public, and the "property" interest of a water user or water rights recipient is qualified by the state. Even when a private party holds a water right, the western states impose substantial restrictions upon the use of this right for the benefit of its citizens.[3] Second, as is developed below, specific acts of Congress have given the arid states authority over their groundwater. Thus, water is subject to state control and never comes into private possession, in the legal sense, as do natural gas and the minnows.

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[3] See 5 *Clark, Waters and Water Rights*, § 416, *et seq.*

The so-called "ownership" doctrine was developed in the 19th century and "is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell*, 334 U.S. 385, 402, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948), quoted with approval in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 1735, 60 L. Ed. 2d 250 (1979) (state may not restrict the export of natural minnows); *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 405, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978) (state may impose higher elk hunting license fees on nonresidents as conservation measures); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977) (Virginia may not prohibit nonresidents from catching menhaden in state waters). We adopt that very special "legal shorthand" here.

Notwithstanding, "the concept expressed by the ownership doctrine is not obsolete . . . [and in] recognition of this important state interest, the Court has upheld a variety of regulations designed to conserve and maintain the natural resources of a State." *Hughes v. Oklahoma*, 99 S. Ct. at 1739 (Rehnquist, J., dissenting), citing *inter alia*, *Baldwin v. Montana Fish & Game Commission, supra; Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960); *LaCoste v. Louisiana Department of Conservation*, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924); *Patsone v. Pennsylvania*, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914). Indeed, only a year ago, the Supreme Court reaffirmed the importance of the "ownership" concept to justify a state controlling, for its own citizens, the commercial use of a resource found uniquely within its borders. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980).

1. *The Concept of State Ownership of Water.*

Our general thesis is that water is special, that there are particular rules relating to groundwater which are separable from the law as to either minnows or natural gas. There is a

common law rule which would make groundwater simply another commodity, like gold or silver; this is "based on the legal premise that water, while moving or motionless in the earth, is not, in the eye of the law, distinct from the earth." 1 Clark, *Waters and Water Rights*, § 17.1. This is commonly referred to as the "English rule," *Acton v. Blundell*, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843); and for early American acceptance of the same view, see *Greenleaf v. Francis*, 35 Mass. 117 (1836). The articulation of the English rule may be stated that groundwater is the absolute property of the owner of the overlying land.

The English rule has been largely rejected in the United States, and particularly in the western states,[4] although the English rule is still followed in Texas; *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955); for general development of the proposition that "Texas still adheres to the old rule," see 5 *Clark, supra*, § 402.1, n.97, § 441, n.24.

In the view just stated, the water is a "thing" which is subject to "ownership" by the person who happens to own the surface land, and it is his. But in the dominant view in the west, the individual is entitled only to "reasonable use" of the underlying water. ". . . [W]estern legislation declares that all unappropriated waters within the state are public or belong to the people . . .," 5 *Clark, supra*, § 440, and par-

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[4] For a review of which states follow the English rule and which states follow some form of the American rule, see 5 *Clark, Waters and Water Rights*, § 441 (the 19 western states); 7 Clark, *Waters and Water Rights*, § 619.1 (the 31 eastern states). For additional elucidation of the two branches of groundwater ownership and application in the states, see Annot., 55 A.L.R. 1385 (1928); Annot., 109 A.L.R. 395 (1937); *Powell on Real Property*, ¶¶ 725-27, 743-44. *See also* F. Trelease, *Federal-State Regulations in Water Law* (1971) (Legal Study No. 5 for National Water Commission) (Vol. XI, Special Studies in Water Law, Background Studies of the National Water Commission); C. Corker, *Groundwater Law, Management and Administration* (1971) (Legal Study No. 6 for National Water Commission) (Vol. XI, Special Studies in Water Law, Background Studies of the National Water Commission).

ticularly n.8 with its voluminous citations. As this is put in New Mexico referring to its "policy, also time honored, as to waters, we had nationalized them. Not as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control." *Threlkeld v. Third Judicial District Court*, 36 N.M. 350, 15 P.2d 671 (1932).

As is more fully developed throughout this brief, the question of what is a "beneficial use" and its limitations is then left entirely to the states to determine. In contrast to the private ownership under the English rule, then, the state can be said to exercise the incidents of ownership under the American rules.[5] As was stated last year by the 10th Circuit Court of Appeals, in referring to New Mexico water law, "The state controls the use of water because it does not part with ownership; it only allows a usufructuary right to water." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981). The Nebraska statutes are an illustration of the common western approach.

2. *The Bearing of the Federal Cases on Western Water Law.*

Geer v. Connecticut, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), held that wild birds were not subject to the

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[5] The Nebraska Supreme Court defines the American rule, which prevails in Nebraska, as limitating the appropriator to amounts not "in excess of a reasonable and beneficial use upon the land which he owns. . . ." In short, under the precise rule, unmodified by statute, the water cannot leave the land. *A fortiori*, it cannot, except as legislation permits, go anywhere else, including out of state. The rise of municipalities which need to draw on land outside their boundaries has given rise to such legislation; for illustration, see *Town of Chino Valley v. City of Prescott*, No. 15501, Supreme Court of Arizona, Nov. 30, 1981. We have deliberately used the plural term "American rules" because there are distinct variances. Clark clarifies doctrines as "the common law or absolute ownership rule permitting unlimited withdrawals, as in Texas"; correlative rights; reasonable use; and prior appropriation. Correlative rights are largely a California concept essentially irrelevant here. Reasonable use is the Nebraska version of the "American rule" under review here. Prior

Commerce Clause; they were not articles of commerce because the state retained ownership over them. The *Geer* doctrine was dismantled bit by bit over the years and ultimately expressly overturned because later courts found that the state no longer retained any incidents of ownership over the item in question, specifically wildlife. Thus, wildlife was no longer "owned" by the state, was an "article of commerce," and therefore was subject to the Commerce Clause.

While *Geer* was overturned by *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), it was on the basis that there could not be an assertion of state ownership over wildlife, just as the Court had concluded that there could not be a state assertion of ownership over certain other natural resources. Just a year prior to *Hughes v. Oklahoma*, the Supreme Court specifically disclaimed any opinion as to the state's authority, "consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, . . ." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

In the natural gas cases, while the state may assert ownership of the gas in the ground, when it is brought to the

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appropriation is widely used, as for example in New Mexico, but is almost universally subject to statutory limitations on beneficial use; see New Mexico for illustration. As is noted in Meyers and Tarlock, *Water Resource Management*, 574, n.4, there is no very large distinction between the reasonable use doctrine and the correlative rights doctrine; the individual appropriation right is subject to the limitation that the groundwater is held in trust for the public and that the state can enforce limitations upon its use not authorized by statute. *State v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950). We have used the term "American rules" above to refer to the combination of beneficial use and prior appropriation limited to beneficial use by statute or constitution as essentially the same; all are policed by the concept of state ownership which becomes the very pedestal on which the water law of almost all the western states rests. (The El Paso brief, p. 10, cites *Clodfelter v. Reynolds*, 68 N.M. 61, 358 P.2d 626 (1961) as illustrative of the fictional nature of public ownership and the reality of marketable water and water rights. El Paso must have some other case in mind; this one does not deal with that topic.)

surface, it becomes the unrestricted property of the surface owners, and the state cannot control its subsequent disposition. *West v. Kansas Natural Gas Co., supra; Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). In Nebraska, on the other hand, the water right is only a usufruct and is thoroughly limited by state regulation.[6]

Underground water is perceived markedly differently from other resources by the Supreme Court. It has never been included in the list of natural resources, such as oil, timber, coal, or wildlife that can be reduced to possession and sold as other products. *See West v. Kansas Natural*

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[6] For extensive discussion of the usufruct theory of groundwater and of the right of the states to control it by legislation, *see Town of Chino Valley v. City of Prescott*, No. 15501, Supreme Court of Arizona, Nov. 30, 1981. For technical discussion of state ownership, see the previous footnote.

The overwhelming weight of state exercise of control over its groundwaters, without challenge from the federal government, is, at the very least, *de facto* recognition of the state primacy. A sprinkling of authorities will suffice: *statutes:* Groundwater Management Act of 1980, Ariz. Rev. Stat. § 45-401 *et seq.*; Kan. Stat. Ann. §§ 82a-701 *et seq*; Okla. Stat. Ann., Tit. 82, §§ 1020.1 to 1020.22; Utah Code Ann. § 73-1-1 *et seq.*; *case law: Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964); *Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979); *Williams v. Wichita*, 190 Kan. 317, 374 P. 2d 578 (1962), *cert. denied*, 375 U.S. 7 (1963); *Crookston Cattle Co. v. Minnesota Dept. of Natural Resources*, 300 N.W.2d 769 (Minn. 1980); *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968). Where, however, the federal authority has overriden state primacy over groundwater, it has been in the context of a national interest, such as water pollution control, *see* Federal Water Pollution Control Act, 33 U.S.C. § 1252(a) ("The [Environmental Protection Agency] Administrator shall . . . prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and groundwaters and improving the sanitary condition of surface and underground waters."); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10; Solid Water Disposal Act, as amended by the Resource Conservation and Recovery Act, Subtitle C, 42 U.S.C. §§ 6921-6934, or protection of a congressionally designated National Monument, *Cappaert v. United States*, 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) (*see* discussion *infra*).

Gas Co., supra, 31 S. Ct. at 571; *Pennsylvania v. West Virginia, supra; Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 2281, 65 L. Ed. 2d 244 (1980). The Supreme Court has specifically said that groundwater is not a locatable valuable mineral under the Mining Law of 1872 and thus is not subject to federal regulation under that law. *Andrus v. Charlestone Stone Products, Inc.*, 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570 (1978), with strong emphasis on "local customs and laws" as the basis of the right to take water. In deciding water allocation cases, the Supreme Court has rarely treated water as an item of property; rather the Court has decided water cases on the basis of sovereign rights between the states and the federal government. *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638, 651 (1957).

Where the English rule prevails, as in Texas, water may be said to become an "article of commerce" as much subject to private ownership as gas or minnows. *See*, for example, *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Texas 1966), *aff'd mem.*, 385 U.S. 35, 87 S. Ct. 240, 17 L. Ed. 2d 34 (1966). Texas had adopted the English rule under which water was an object of absolute possession; 255 F. Supp. at 840. Thus, ownership of the water rested in the private party under Texas property law; because the water was privately owned, it was an article of commerce, and the state could not restrict its transport across the state line. This was the express basis for the trial court's decision. The *Altus* case, in short, tracks and relies directly upon *West v. Kansas Natural Gas Co., supra*, which forbade inhibition of gas transportation because the gas was reduced to possession in the technical sense of absolute ownership once it came to the surface.

Where there is no such ownership right, an opposite result is reached. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908). This is a square holding that "the common law recognizes no right in the riparian owner, as such, to divert water from the stream

in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others." *McCarter* bears on many aspects of this case. It bears squarely at this point on the fact that at least among western arid states, water never becomes an article of commerce at all.[7]

The United States Supreme Court has repeatedly recognized that water in the arid West is a unique resource not governed by the free marketplace. Water in navigable and non-navigable rivers has been equitably apportioned among the states. *Kansas v. Colorado*, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907); *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Wyoming v. Colorado*, 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922). In apportioning waters in these streams, the Court has considered not only the present need for water of states but future needs for growth. *See Arizona v. California, supra.* If water were not unique, there would be no need for equitable apportionment by the Supreme Court; barter and trade in commerce could supply the right to take the water. Equitable apportionment, or, alternatively, interstate compacts, are used to establish interstate access to water as a substitute for bargain and sale. In many areas the ground and surface waters are hydrologically connected. Movement of groundwaters across the state line will result in reallocation of the surface waters contrary in many cases to interstate compacts, reclammation projects, and, in the El Paso case, international treaties.[8]

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[7] The suggestion is made that *Hudson County*, a surface water case, is subordinate to *Altus*, a groundwater case. This misses the point. Texas is an "English rule" state as to groundwater. New Jersey is an "American rule" or reasonable use state as to its surface water, *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (1909). In both *McCarter* and in *Altus*, the Court relied on state law, and it should do so here.

[8] For recognition of the legal consequences of the end relation between surface and groundwater resources, see 5 *Clark, supra*, § 441.

3. *The Distinction Between Water and Other Natural Resources was Made in* West v. Kansas Natural Gas Co., *and This Distinction is Controlling Law.*

West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), is the seminal case under the Commerce Clause denying a state the right to control the export of natural resources, on conservation grounds, when the state does not own the resource. Gas, when reduced to possession is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce.

In order to reach this conclusion, the *West* court faced a major hurdle in distinguishing *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), which had upheld New Jersey's prohibition against the export of river water to New York. *West* found that *McCarter* was decided on two grounds: first, the police power, that the waters were an important part of the natural advantages of the state and state residents rely upon its availability. "The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government," citing the New Jersey state court. The second crucial distinction of *McCarter* in *West* was that a private individual could not divert the river water in order to merchandise it because he had no unlimited property interest in the water. Rather, the greater authority was in the "guardian of the public welfare," whose responsibility it was to decide a "more perfect use" of the state's waters.

West not only distinguished *McCarter*, it established the distinction between water and all other natural resources. It must be regarded as precedent in both respects: for its prohibition of restriction on totally privately owned substances such as gas and its recognition of the rights of the originating state as to water. *West* has been cited in all the leading Commerce Clause-resource cases to the present moment;

see, e.g., Pennsylvania v. West Virginia, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 69 S. Ct. 657, 57 L. Ed. 865 (1949); *Federal Power Commission v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed. 2d 377 (1961); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964); *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 385-86, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978); and *Hughes v. Oklahoma, supra*, the lead case for El Paso. *West* is conclusive and most reputable authority for the proposition on which we stand: the state's relationship to its water gives it effective authority in relation to the Commerce Clause which it may lack as to other resources.

B. *Congress Has Given the States Plenary State Control Over Their Water.*

Congress can give the states plenary power permitting controls which otherwise might encroach upon the commerce power. *See*, for example, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946). The Supreme Court upheld a South Carolina tax on premiums collected by foreign insurers doing business in South Carolina. The tax did not violate the Commerce Clause because Congress had specifically delegated to the states the authority to impose this tax and to regulate the insurance business. The fact that the state act discriminated against interstate commerce was therefore immaterial.

The same point was made from another perspective in the seminal case of *Cooley v. Board of Wardens*, 52 U.S. (12 Howard) 299, 13 L. Ed. 996 (1852), in which it was held that state regulation of harbor pilots was permitted since a 1789 federal statute left regulation of pilots to the states.

Similarly, Congress has delegated to the states the power to allocate water. In more than 37 separate enactments, beginning as far back as 1866, Congress has consistently recognized, acquiesced in, and deferred to the authority of the states over water supplies within the states. The most prominent of these are the Act of July 26, 1866, commonly known as the Mining Act of 1866, ch. 262, 14 Stat. 251; the Act of March 3, 1877, commonly known as the Desert Land Act of 1877 ch. 7, 19 Stat. 377, 43 U.S.C. § 321; and the Act of June 17, 1902, commonly called the Reclamation Act of 1902, 32 Stat. 388. For a brief description of some relevant statutes, see the appendix to this brief collecting them.

The Mining Act of 1866 was not itself a grant of water rights pursuant to federal law. *California v. United States*, 438 U.S. 645, 656, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978). Rather, it was a recognition by the United States of preexisting rights of possession, constituting a valid claim to continued use. *Id.*, citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 705, 19 S. Ct. 770, 32 L. Ed. 1136 (1899). "Congress intended 'to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their conditions' " *Id.*, citing *Basey v. Gallagher*, 87 U.S. 670, 20 Wall. 670, 684, 22 L. Ed. 452 (1875). The comments of Senator Stewart during the debate surrounding the enactment of the Mining Act is instructive of Congress' intent. Senator Stewart noted that the Act

> confirms the rights to use of the water . . . as established by local law and the decisions of the court. In short, it proposes no new system, but sanctions, regulates, and confirms a system to which people are devotedly attached.

Congressional Globe, 39th Cong., 1st Sess., 3227 (1866). With the Mining Act of 1866 Congress established a long pattern of respecting local and state laws and customs in regard to the use and regulations of water rights.

The Desert Land Act of 1877 was enacted by Congress for the purpose of assisting the settlement and expansion of the western states. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157-58, 55 S. Ct. 725, 79 L. Ed. 1356 (1935). Therein Congress recognized that the states were better situated to determine what principles of water law were more conducive to settlement and reclamation of the semi-arid or desert lands of the West.

The effect of the Desert Land Act was to sever the unappropriated waters on the public domain from the land itself and to reserve the water for the use of the public according to state law. *Id.*

As Senator McCarran said in the debate on the Act of July 10, 1952, 66 Stat. 560:

> The government has long recognized and conceded, particularly in the Desert Land Act of 1877, the supremacy of state law with respect to the acquisition of water. It has been under these state laws that the water rights of the owners on a given stream have been adjudicated.

82nd Cong., 1st Sess., *Cong. Record*, 12947-48 (Oct. 11, 1951).

Against the background of the Desert Land Act of 1877 and the Mining Act of 1866, Congress passed the Reclamation Act of 1902. *California v. United States*, 438 U.S. at 663, which again shows Congress' respect for, and deference to, state water law. First, the Secretary of the Interior was required to appropriate, purchase, or condemn the neces-

sary water rights in strict conformity with state law. Second, once the waters were released from a dam or reservoir, their distribution to individual landowners was controlled by state law. *California v. United States, supra.*

There were three principal reasons for federal deference to state water law. First, the climate and terrain differed from state to state, leaving each state uniquely situated to deal with its particular conditions. Second, application of both state and federal law would lead to conflict and confusion in determining the governing law. *Id.* Third, Congress intended to follow the well-established federal precedent of recognizing state water law. *Id.*

> As representative Mondell noted after reviewing the legislation ... every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard.

Id., citing to 35 Cong. Rec. 6679 (1902).

This Court has only recently elaborately considered an important distinction, the federal reserved rights in groundwater underlying the public lands as distinguished from state control over its own groundwater; *see Cappaert v. United States*, 426 U.S. 128, and particularly 138-46, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). The Court, in comprehensively considering the reserved federal rights, clearly recognizes the power of the states to determine water rights in accordance with state law except for the federal reservations; see expressly 426 U.S. at 143, noting particularly the citation of the leading case, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162, 55 S. Ct. 725, 79 L. Ed. 1356 (1935), which says:

> ... [I]t [the Desert Land Act] effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.
> ... [And] all nonnavigable water [in the public domain] should be reserved for the use of the public

under the laws of the states and territories named.[9]

The entire discussion in *Cappaert* would have been meaningless if the states did not have, except as to the federal government, plenary control over their underground water.

The Supreme Court cases are not the only federal recognition of the primacy of state control over groundwater. In 1961, the Senate Select Committee on National Water Resources issued a report basic to water resource deliberations of the past 20 years.[10] The report noted that the clear federal responsibilities were flood control and the maintenance of navigability where navigability is an economic fact. "However, in our 184 years as a nation, the citizens of the individual states philosophically and historically have had recognized powers and responsibilities for the control, use and development of the water resources within their state boundaries in accordance with local needs and conditions." (P. 67). The only other suggestion of national involvement was the need for compacts where acquifers crossed state lines.

As an aftermath of this report, the National Water Commission was directed to study the problems of reconciling federal and state water law and of integrating groundwater and surface water management. National Water Commission, *Water Policies for the Future* (1973). In chapter 13 of its report, the Commission reviewed federal and state water jurisdiction. The Commission said, p. 461:

> At the outset, the fundamental proposition that the United States must be able to exercise all of its constitutional powers and carry out all national policies, purposes, and programs free from State control must

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[9] This position was acknowledged and reasserted by the Supreme Court in *California v. United States*, 438 U.S. 645, 657-58, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

[10] Report of the Select Committee on National Water Resources, S. Rep. No. 29, 87th Cong., 1st Sess. (1961).

be acknowledged. The Constitution specifies the Nation's powers and the functions of the Congress. These cannot be abandoned. The United States has an interest in all sources for the benefit of all of its people, not just those who live in the neighborhood in which a given issue arises.

The States, however, have a valid interest in protecting the rights of persons to use water and in the values associated with those rights. State water law and procedures are concerned with local conditions, with water rights held by individuals and organizations, with public water supplies for cities, and in general with promotion of State prosperity. Although State water laws are adapted to local conditions, they usually seek to create a system of secure water rights that will encourage investment yet provide the flexibility needed to accommodate change. In many States, water rights are quantified and recorded, withdrawals policed, uses regulated, and supplies rationed. *This is the traditional sphere of State Action.* (Emphasis added).

II. *The Nebraska Statute Is a Valid Exercise of the Police Power Which in Turn Imposes a Proper Limitation upon the Negative Implication of the Commerce Clause.*

A. *Introduction.*

The Commerce Clause as a restriction on state action at some points runs into the Police Power. For an early and still significant discussion, see *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 7 L. Ed. 412 (1829), in which the state of Delaware impeded navigation in a marshy area by authorizing a dam; the Court held, through Chief Justice Marshall, that the Police Power to protect the health of the citizens made the statute not repugnant to the dormant Commerce Clause.

In more recent times, the Supreme Court has concluded that the counterweight to the Commerce Clause is the Police Power. In a phrase quoted earlier, the Court said, "In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976). Furthermore, the recent wildlife cases, when noting that the state "ownership" of wildlife was a 19th century legal fiction expressing the importance of state power to preserve an important resource, have gone on to state that "[u]nder modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284-85, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977).

As Chief Justice Taney said in *The License Cases*, 46 U.S. (5 Howard) 504, 584, 12 L. Ed. 256 (1847), "[the police powers] of a state are nothing more or less than the powers of the government inherent in every sovereignty to the extent of its dominions."

The arid states are entitled to believe that preservation of their groundwater is an essential privilege of how a state shall use its water resource and the pace at which it shall

develop.[11]

The power over water is a classic illustration of the Police Power. As is said in *Ex Parte Maas*, 219 Cal. 422, 27 P. 2d 373, 374 (1933): "Legislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state."

We draw from the concept of sovereignty the right of the state to preserve "integral governmental functions," as well as the public trust doctrine. *See National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), in which this Court held that the determination of whether the Fair Labor Standards Act should apply to state municipal government employees was a function essential to the separate independent existence of the states. This Court held that the federal regulatory scheme unconstitutionally displaced the states' freedom to structure integral operations in areas of traditional government functions. The Court emphasized that "[w]e have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. Referring to the Commerce Clause, the Court said that "[W]e have reaffirmed today

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[11] For nearly 60 years, the Supreme Court has recognized that a locality's use of its zoning powers in order to regulate growth is a legitimate exercise of the police power. *See Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (legitimate state interest to protect state from ill effects of urbanization); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). For direct illustration of the zoning cases as authority for state groundwater control, *Town of Chino Valley v. City of Prescott*, No. 15501 (Arizona Supreme Court, Nov. 30, 1981).

that the States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. . . . [S]uch assertions of power if unchecked, would indeed . . . allow 'the national government [to] devour the essentials of state sovereignty.' " 426 U.S. at 854-55.[12]

Under the law applicable to the arid west, control over water is of the ultimate essence of state authority and responsibility.[13] For complete recognition of that fact by Congress and by this Court, *see California Oregon Power Co. v. Beaver Portland Cement Co., supra.* The conception of the states' ultimate responsibility for water is reflected in the public trust doctrine. *See* W. Rodgers, *Environmental Law*, 173 (1977). The public trust concept is also another way of articulating the state "ownership" doctrine for natural resources. *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638 (1957); Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471 (1970).

For a discussion of the trust theory of California water law which placed a trust on the state and irrigation districts for the benefit of water users, see *Ivanhoe Irrigation District v. All Parties and Persons*, 47 Cal. 2d 597, 306 P.2d

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[12] *Usery* emphasised the special nature of state authority. See its references to *Fry v. United States*, 421 U.S. 542, 95 S. Ct. 1792, 44 L. Ed. 2d 363 (1975), in which the Court stressed the reserve power of the states under the Tenth Amendment "to function effectively in a federal system"; *Texas v. White*, 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1869); and see *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 19 L. Ed. 101 (1869), stressing "the independent authority of the states."

[13] For emphatic statement of this, see *Threkeld v. Third Judicial District Court*, cited and quoted *supra*, to the effect that water is an "elemental necessity, like air" which must not be allowed to fall into "private ownership."

824 (1957), *rev'd sub nom. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958). The California court held that California's title to the unappropriated domestic waters of the state was based on constitutional provisions, by statutes, and by decisional law. While *Ivanhoe* was reversed by this Court wholly on a reserve federal right theory, the reversing decision was subsequently modified with an emphatic reiteration of the duty "to follow state law as to water rights" in *California v. United States*, 438 U.S. 645, 673, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

B. *The State's Control of Groundwater is a Rational Exercise of the Police Power; Herein of* McCarter.

From the beginning of American history, water has been held to be especially subject to the police power. As was said in *New Jersey v. New York*, 283 U.S. 336, 342, 51 S. Ct. 478, 75 L. Ed. 1104 (1931): "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." The leading case on the prohibition of water export as an exercise of the police power is *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), a case holding that New Jersey might prohibit the diversion of water beyond the state. Since New Jersey was a riparian rather than a prior appropriation and Desert Land Act state, Justice Holmes for the Court rested his decision not upon the "attenuated residuum of title" but rather "upon a broader ground."

The Justice enunciated what has become one of the most classic expressions of his jurisprudence and one singularly apposite here where we deal with the border between the Commerce Clause and the Police Power:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. *209 U.S. at 355*

The Justice then held that the very ultimate of the Police Power was its control of the waters of the jurisdiction: "few public interests are more obvious, indisputable, and independent of particular fears than the interests of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." 209 U.S. at 356.

The Court continued that the state need not give reasons for protecting its water: "It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." 209 U.S. at 357. So far as the Commerce Clause is concerned, the Court observed that, "a man cannot acquire a right to property by his desire to use it in commerce among the states. . . . The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line." *Id.* All this was said to be an exercise of the "police power" of the state.

As this Court said in *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887):

> It belongs to [the legislative branch of the government] to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

The same rule was articulated in *Patsone v. Pennsylvania*, 232 U.S. 138, 144, 34 S. Ct. 281, 58 L. Ed. 539 (1914).

As was said in *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894), "[t]o justify the state in thus interposing its authority [the police power] in behalf of the public, it must appear—first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The argument made by those who would challenge the Nebraska law is that *McCarter*, while never having been expressly overruled, is drained of its vitality either by *West v. Kansas Natural Gas Co.*, *supra*, or *City of Altus v. Carr*, *supra*. As we have adequately developed earlier in this brief, the *West* case, far from overruling or even disagreeing with *McCarter*, makes precisely the distinction as to the unique character of water which we advance here, and *West* has been cited over and over again from the date of its decision until most recent times. *Altus*, as we have adequately developed, rests upon the unique water law of Texas and the so-called "English rule." We cannot accept the view advanced by appellants that this Court, in a single one-line affirmance of the appeal in *Altus*, *supra*, overruled the opinion of Justice Holmes in *McCarter* without reference and without discussion.

CONCLUSION

The states have exercised plenary control over their groundwater from the earliest times until today. The exclusive exception is for those few states which have, as their own act, seen fit to adopt the exclusive property right instead of the usufructary theory of groundwater. That power of the state, limited only by federal reserved rights as to public lands, has been recognized time and again by this Court and so often by Congress that this statement becomes ponderous by the very listing of them.

We respectfully submit that nothing in the Commerce Clause upends the states' plenary power over their own groundwater and that the decision of the Nebraska Supreme Court should be affirmed.

Respectfully submitted,

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Appendix

APPENDIX

QUOTATIONS FROM STATUTES REFERRED TO IN BRIEF BEARING ON FEDERAL ACCEPTANCE OF STATE WATER CONTROL

1. Excerpt from § 17 of the Act of July 9, 1870, 16 Stat. 218: "[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the 9th section of the act of which this act is amendatory." [The Mining Act of 1866.]

2. Section 18 of the Act of March 3, 1891, 26 stat. 1095, 1101-1102. "That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed with the purpose of irrigation and duly organized under the laws of any state or territory *** [Provided], that *** the privilege herein granted shall not be construed to interfere with control of water for irrigation and other purposes under authority of the respective States or Territories."

3. Act of February 26, 1897, 29 Stat. 599, 43 U.S.C. § 664: "That all reservoir sites reserved or to be reserved shall be open to use in occupation under the right-of-way act of March third, eighteen hundred and ninety-one. Any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the charges for water coming in whole or part for reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

4. Excerpt from the Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. § 481: "All waters on such [forest] reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such forest reservations are situated. . ."

5. Section 4 of the Act of February 1st, 1905, 33 Stat. 628 "That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purpose of the milling and reduction of ores, during the period of beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the state or territory in which said reserves are respectively situated."

6. Federal Power Act of June 10, 1920, 41 Stat. 1063, 1068, 16 U.S.C. § 802(b), "Section 9. Each applicant for a license hereunder shall submit to the commission *** (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act."

7. Section 18 of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057, 1065, "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

8. Excerpt from Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 1271, 43 U.S.C. § 315(b): "That nothing in this act shall be construed or administered in any way to diminish or impair any right to the possession to the right or use of water for mining, agricultural, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or required or maintained in accordance with such law."

9. Exerpt from Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 774, 779, 43 U.S.C. § 618(m): "Nothing herein shall be construed as interfering with such rights as the states now have either to waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders except as modified by the Colorado River Compact or other interstate agreements."

10. Section 1(b) of the Flood Control Act of December 22, 1944, 58 Stat. 887, 889: "The use for navigation in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states aligned wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States wholly or partly west of the ninety-eighth meridian of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes."

11. Reservation (c) to the Mexican Water Treaty, U.S. Treaty Ser. No. 994, 59 Stat. 1265 (1945): "(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the Interna-

tional Boundary and Water Commission, or the United States Section of said Commission directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual states."

12. Excerpt from Section 2 of the Act of October 14, 1949, 63 Stat. 852, 853 authorizing the American River Division, Central Valley Project, California: "Nothing contained in this act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with state water laws, including but not limited to such laws giving priority to the counties and areas or origin for present and future needs."

13. Excerpt from § 208 from the Act of July 10, 1952, 66 Stat. 560, "Consent is hereby given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United states is not amenable hereto by reason of its sovereignty. . ."

14. Section 3(e) of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 31, "Nothing in this act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface water; and the control appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such states."

15. Section 4(b) of the Act of July 23, 1955, 69 Stat. 367, 368-369, 30 U.S.C. § 612(b), providing for multiple use of the surface of tracts of public lands: "That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with or modify the laws of the states

which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use and distribution of ground or surface waters within any unpatented mining claims."

16. Excerpt from Section 4(b) of the Small Reclamation Projects Act of August 6, 1956, 70 Stat. 1044, 1045. 43 U.S.C. § 422(d) (b): "Every such proposal shall include a proposal that the organization already holds or can acquire all lands and interests in land (except public and other lands and interest in land owned by the United States which are within the administrative jurisdiction of the Secretary and subject to disposition by him) and rights, pursuant to applicable State law, to the use of water necessary for the successful construction, operation, and maintenance of the project . . ."

For more examples of federal recognition of state authority over water rights, see Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2nd Sess. 302-310 (1964) (Appendix B, supplementary material submitted by Senator Kuchel).

Amicus Brief

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No. 81-613

IN THE

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OCTOBER TERM, 1981

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AND
DELMER MOSS,

Appellants,

v.

STATE OF NEBRASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE
STATE OF NEBRASKA

BRIEF OF THE CITY OF EL PASO AS *AMICUS CURIAE*

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QUESTION PRESENTED

Does a state's claim of "public ownership" of groundwater exempt from review under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, any restrictions that the state may place on groundwater exports?

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ON APPEAL FROM THE SUPREME COURT
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BRIEF OF THE CITY OF EL PASO AS *AMICUS CURIAE*

The City of El Paso respectfully submits this Brief as *Amicus Curiae*, having obtained consent to do so from Appellants and Appellee. Copies of these consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Groundwater is a natural resource, and in many regions it is scarce.[1] Many western states assert public ownership of

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[1] *See* 1 U.S. WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES; SECOND NATIONAL WATER ASSESSMENT 3 (1978).

groundwater located within their boundaries.[2] A number of these states by statute either prohibit or restrict the export of groundwater.[3] These export restrictions threaten to balkanize the future growth of the western states. They utilize the accident of state boundaries to deprive existing cities of access to logical and economic water sources and to inhibit the allocation of water on the basis of national economic efficiencies.[4]

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[2] Most of these states assert that groundwater belongs to the "public": COLO. REV. STAT. § 37-82-101; NEV. REV. STAT. §§ 533.025, 534.020(1); N.M. STAT. ANN. §§ 72-12-1, -18; N.D. CENT. CODE § 61-01-01; OR. REV. STAT. § 537.110; UTAH CODE ANN. § 73-1-1; WASH. REV. CODE ANN. §§ 90.03.010, .44.040.

Some states claim that groundwater is the property of the "state": MONT. CONST. art. IX, § 3(3); IDAHO CODE § 42-226; MONT. REV. CODES ANN. § 85-2-101(1); WYO. STAT. §§ 41-3-101, -115.

A few states maintain that groundwater belongs to the "people": ALASKA CONST. art. VIII § 3; ALASKA STAT. § 46.15.030; S.D. COMP. LAWS ANN. § 46-1-3.

[3] Several states, like Nebraska, require reciprocal treatment from the state in which the groundwater is to be used: COLO. REV. STAT. § 37-81-103; IDAHO CODE §§ 42-401, -408 to -411; KAN. STAT. ANN. § 82a-726; NEB. REV. STAT. § 46-613.01; NEV. REV. STAT. § 533.515; S.D. COMP. LAWS ANN. § 46-1-13; WASH. REV. CODE ANN. §§ 90.16.110 & .120.

Other states prohibit the interstate export of groundwater except upon legislative or administrative agency approval: MONT. REV. CODES ANN. § 85-1-121; OR. REV. STAT. §§ 537.810, .870; S.D. COMP. LAWS ANN. § 46-5-20.1; UTAH CODE ANN. § 73-2-8; WYO. STAT. §§ 41-3-105, -115(b).

Two states combine the reciprocity and approval features: WASH. REV. CODE ANN. § 90.03.300 permits exports when reciprocity exists or, if reciprocity is absent, when discretionary approval is given, while WYO. STAT. § 41-3-115(c) permits exports only when both reciprocity exists and discretionary approval is given.

Finally, five states impose essentially absolute embargoes: COLO. REV. STAT. § 37-90-136; MONT. REV. CODES ANN. § 85-2-104; NEV. REV. STAT. § 533.520; N.M. STAT. ANN. § 72-12-19; OKLA. STAT. ANN. tit. 27, § 7.6.

[4] A considerable literature has developed dealing with these statutes. Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51; Ladd, *Federal and Interstate Conflicts in Montana Water*

The City of El Paso has a vital interest in this subject. El Paso, a large and rapidly growing city, is the economic capital of an interstate region that faces an acute water supply shortage.[5] To alleviate its water supply problems, El Paso seeks access to essentially unused groundwater located just across the state line in New Mexico. New Mexico, however, flatly prohibits the export of groundwater.[6] El Paso has sued for a declaration that the New Mexico groundwater embargo is unconstitutional and for an injunction against its enforcement. The suit is pending in federal district court. *City of El Paso, et al.* v. *Reynolds, et al.* No. 80-730-HB (D.N.M., filed Sept. 5, 1980, trial on the merits commenced January 11, 1982).

There are substantial differences between El Paso's case and this one. First, unlike Appellants Sporhase and Moss, El Paso

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Law: Support for a State Water Plan, 42 MONT. L. REV. 267 (1981); Schenkkan & Anson, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEXAS L. REV. 71 (1980); White, *Reasonable State Regulation of the Interstate Transfer of Percolating Water*, 2 NAT. RESOURCES LAW 383 (1969); Comment, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause? Or Will New Mexico's Embargo Law Hold Water?*, 21 NAT. RESOURCES J. 617 (1981); Comment, *"It's Our Water!" — Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER L. REV. 119 (1975); Note, *Interstate Transfer of Water — The Western Challenge to the Commerce Clause*, 59 TEXAS L. REV. ___ (1981) (forthcoming); Clyde & Clyde, State Prohibitions on the Interstate Exportation of Scarce Water Resources, Water Resources Allocation: Laws and Emerging Issues (1981 Conference, University of Colorado School of Law); Western States Water Council, Memorandum on Constitutionality of State Statutes Prohibiting or Restricting the Exportation of State Water (November 4, 1976).

[5] *See generally* U.S. DEPT. OF INTERIOR, SPECIAL REPORT ON ELEPHANT BUTTE RESERVOIR — FORT QUITMAN PROJECT NEW MEXICO — TEXAS (RIO GRANDE REGIONAL ENVIRONMENTAL PROJECT) (1980).

[6] N.M. STAT. ANN. § 72-12-19 provides, in pertinent part: "No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state . . . ."

does not challenge a state's authority to impose reasonable permit requirements on groundwater exports. In fact, El Paso has filed applications for permits to appropriate groundwater in strict compliance with all provisions of New Mexico law other than the embargo.[7] Second, unlike Nebraska, New Mexico forbids the export of groundwater under essentially all circumstances. New Mexico's absolute embargo involves a more straightforward constitutional issue than the Nebraska statute, which allows groundwater exports under specified conditions, including reciprocity by the state of intended use.[8]

The two cases, however, present different aspects of another issue. Nebraska contends that its statute requiring permits for groundwater exports is exempt from Commerce Clause review. This contention rests on the theory that because water in Nebraska is defined under state law as publicly owned, it is therefore not an article of commerce for purposes of the United States Constitution. New Mexico makes a somewhat similar argument, based on New Mexico law, in defense of its groundwater embargo statute. El Paso wishes to address this argument.

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[7] After denying them without a hearing, the State Engineer of New Mexico on motion for rehearing postponed hearings on El Paso's applications until the constitutionality of New Mexico's embargo statute has been litigated.

[8] If New Mexico permitted export under similar conditions, El Paso would qualify: Texas permits groundwater exports, by virtue of the court order in *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.) (3 judge court), *aff'd per curiam*, 385 U.S. 35 (1966).

SUMMARY OF ARGUMENT

State restrictions on interstate commerce in water and water rights are subject to judicial review under the Commerce Clause of the United States Constitution. A state's claim of "public ownership" of groundwater is merely a fiction expressive of the important public interest in regulating use of this scarce natural resource; it does not justify discrimination against interstate commerce in the resource.

ARGUMENT

I. WATER IS AN ARTICLE OF COMMERCE UNDER FEDERAL LAW

The Nebraska Supreme Court asserts that because, under Nebraska state law, groundwater is publicly owned, by definition it can never become an article of commerce. *Nebraska* v. *Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981). As a result, the court concludes, the Commerce Clause does not apply to NEB. REV. STAT. § 46-613.01. Aside from being misdirected,* this argument is erroneous as a matter of federal constitutional law.

Federal constitutional law demands uniformity of application without regard to variations in state property law. This is especially true for the Commerce Clause, whose essential function is to prevent discriminatory variations in state law from frustrating interstate commerce:

> The purpose [of the Constitution's implicit prohibition on state discriminatory regulation of interstate commerce] is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws

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*The issue before the Nebraska Supreme Court was whether the permit and reciprocity requirements of NEB. REV. STAT. § 46-613.01 are reasonable requirements that do not unduly burden interstate commerce. In light of *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976), El Paso assumes that the reciprocity requirement is unconstitutional, but will not address the reasonableness either of requiring permits or of requiring reciprocity.

> and to ensure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation — one and the same people.

Pennsylvania v. *West Virginia*, 262 U.S. 553, 596 (1923). Our economy could be balkanized by accidental or deliberately discriminatory variations in state law defining property. The constitutionality of restrictions on interstate transportation and use of groundwater therefore cannot and does not depend on how the resource is defined. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 622 (1978).

Nebraska's attempt to remove its groundwater statute from Commerce Clause review is foreclosed by *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.) (3 judge court), *aff'd per curiam*, 385 U.S. 35 (1966). There, a Texas statute prohibiting the export of groundwater was delared to violate the Commerce Clause. Nebraska attempts to distinguish *Altus* by invoking *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908). As we shall demonstrate, however, the doctrine and precedent upon which *Hudson County Water Co.* rests have been overruled.

In *Hudson County Water Co.*, the Court upheld a New Jersey statute that prohibited the export of surface water. In an opinion by Justice Holmes, the Court stated that "the state, as quasi-sovereign and representative of the interests of the public, has a standing in Court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355. Accordingly, New Jersey "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 357. On this basis, Justice Holmes rejected the water company's due process argument under the Fourteenth Amendment. Justice Holmes

also denied in passing the company's Commerce Clause argument, remarking that "A man cannot acquire a right to property by his desire to use it in commerce among the states." *Id.* In both contexts, Justice Holmes cited and relied upon *Geer* v. *Connecticut*, 161 U.S. 519 (1896).

The basic doctrine of *Hudson County Water Co.* was overruled while its author was still a member of the Court. Only three years later, in *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the Court ruled that Oklahoma could not constitutionally embargo natural gas found within its borders. The Court emphatically rejected the notion that a state may keep natural resources within its borders:

> If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargment, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.'

Id. at 255. Justice Holmes dissented without opinion.

The demise of the *Hudson County Water Co.* doctrine was confirmed in 1923, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). The Court held that West Virginia could not favor its own citizens in the supply of natural gas found within that state. The Court quoted the principles it had announced in *West*. Justice Holmes dissented again, writing an opinion that specifically addressed the majority's holding that the Commerce Clause prevents a state from giving a preference to its inhabitants in the enjoyment of its natural advantages. He stated that he could see nothing in the Commerce Clause to prevent preferential treatment, whether the subject was natural gas, mines,

forests or water, citing *Hudson County Water Co.* v. *McCarter*. *See* 262 U.S. at 600-03.

Finally, this Court's decision in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), squarely overruled *Geer* v. *Connecticut*, the principal authority relied upon by Justice Holmes in *Hudson County Water Co.* As explained by the Court, *Geer* rested on the holding that no interstate commerce was involved in a statute forbidding the transportation beyond the state of game birds killed within the state. This conclusion, in turn, followed from the view that the state has the power, as representative of the public, to keep wild game birds within its jurisdiction for all purposes and to prevent them from becoming articles of interstate commerce. The Court noted that in *West* it had rejected the *Geer* approach. *Id.* at 329. In subsequent Commerce Clause challenges to state restrictions on exports of natural resources, the Court noted, "the *West* analysis emerged as the dominant approach," citing, *inter alia*, *Pennsylvania* v. *West Virginia*. *See* 441 U.S. at 330.

II. WATER IS AN ARTICLE OF COMMERCE IN THE WESTERN STATES

The established rule is that a state's claim of public ownership of a natural resource is merely "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948). State regulation of publicly owned resources must, like any other regulation, be non-discriminatory within the traditional requirements of the Commerce Clause.[10] When a statute on its face discriminates against interstate commerce in a natural resource

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[10] A distinction is made when the state enters a manufacturing business as a market participant. Like a private company, a state is free to deal with the output of its proprietary manufacturing plant. It is not free, however, to embargo the export of scarce raw materials used in the manufacturing process. *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980).

claimed to be "publicly owned," such discrimination is either *per se* unconstitutional or, at a minimum, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 441 U.S. at 336-37.

With respect to water, "public ownership" was recognized as a fiction, expressive in legal shorthand of the public interest in regulating this often scarce natural resource, long before *Toomer* v. *Witsell*, and even before *West*. For instance, one early authority on western state water law stated: "It, therefore, follows that the office of the State is regulative and administrative, and that the State acts in its sovereign capacity rather than [as] owner." 1 C. KINNEY, LAW OF IRRIGATION AND WATER RIGHTS, § 372 (2d ed. 1912). Modern authorities express similar views.[11]

Despite claims of "public ownership," western states normally treat water as a commodity, permitting market transfers to reallocate the resource to more productive uses. Obviously "water, from whatever source, is not economically different from other resources." C. CORKER, GROUNDWATER LAW, MANAGEMENT AND ADMINISTRATION 127 (1971). As a consequence, absent some specific compelling reason to the contrary, water "should be allocated and used as economic efficiency dictates." *Id.* at 142. "Public ownership" systems of water law recognize this policy goal and permit reallocations of water, as economic efficiency dictates, by permitting individuals to acquire water

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[11] *See, e.g.*, Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 653 (1957) ("We usually mean by 'state ownership' that in a crowded world the social interest in the use and conservation of the water resources has become more important than some individual interests."); *See also* Corker, *Water Rights in Interstate Streams*, in 2 WATERS AND WATER RIGHTS 296 (Clark ed. 1967) ("In statutes declaring that a state 'owns' the waters within its boundaries the word 'owns' is not used in its ordinary sense; these statutes bespeak a policy that a water user's property rights may not be his to dispose of with the same freedom that he has with respect to other kinds of property."); C. MEYERS & D. TARLOCK, WATER RESOURCES MANAGEMENT 390 (2d ed. 1980).

rights that are transferable property rights. Trelease, *Water Rights of Various Levels of Government — States' Rights v. National Powers*, 19 WYO. L.J. 189, 194-95 (1965). Furthermore, in the western states, water itself is generally characterized as personal property once it is reduced to possession. *See, e.g., Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 113 P. 823 (1911); *see generally* 1 WIEL, WATER RIGHTS IN THE WESTERN STATES § 35 (3d ed. 1911); 2 C. KINNEY, LAW OF IRRIGATION AND WATER RIGHTS § 774 (2d ed. 1912). The rule that water, once reduced to possession, is personal property subject to control and sale like any commodity, is particulary clear with respect to municipalities. *See, e.g., Robbins v. City of Rapid City*, 71 S.D. 171, 23 N.W.2d 144 (1946).[12]

The case of New Mexico illustrates the fictional nature of public ownership of groundwater and the reality of marketable water and water rights. Under New Mexico law, a lawfully acquired water right is a property right. *Lindsey v. McClure*, 136 F.2d 65, 70 (10th Cir. 1943); *Murphy v. Kerr*, 296 F. 536, 541 (D.N.M. 1923); *Clodfelter v. Reynolds*, 68 N.M. 61, 358 P.2d 626 (1961). The market in water rights is vigorous and of substantial economic importance. *See, e.g.*, NEW MEXICO WATER RESOURCES RESEARCH INSTITUTE REPORT NO. 092, FORECASTING FUTURE MARKET VALUES OF WATER RIGHTS IN NEW MEXICO (November 1977). Water itself, once reduced to personal possession pursuant to a lawful water right, is private

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[12] The marketability of privately owned water rights in publicly owned water is precisely what enables western states to overcome the economic rigidity inherent in the "first-in-time is first-in-right" doctrine of prior appropriation and respond to changing economic conditions. For this purpose, it does not work perfectly, but it works well enough. *See* Trelease, *Water Law Policies, and Politics — Institutions for Decision-Making*, in WESTERN WATER RESOURCES 204-06 (1979). The transferability of water rights and water permitted under prior appropriation systems works across state lines as well as within states. *See, e.g., Bean v. Morris*, 221 U.S. 485 (1911); *Lindsey v. McClure*, 136 F.2d 65 (10th Cir. 1943); *Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941).

property under New Mexico law. *Hagerman Irrigation Co.* v. *McMurry*, 16 N.M. 172, 180, 113 P. 823, 825 (1911); *see also Snow* v. *Abalos*, 18 N.M. 681, 695, 140 P. 1044, 1050 (1914). The Director of New Mexico's Water Resources Research Institute acknowledges that in New Mexico "Water is a marketable commodity and will probably be sold to the highest bidder." NEW MEXICO WATER RESOURCES RESEARCH INSTITUTE REPORT NO. 104, WATER RESOURCES AND GROWTH OF THE MESILLA VALLEY 12 (June 1979). The State of New Mexico and the United States Department of the Interior flatly state that "The rationale of transferring water rights from irrigation to higher economic uses reflects the concept of New Mexico law that a water right is a property right which is marketable and which can be acquired to obtain a water supply for a specific use by an individual, company, organization, or city." U.S. DEPT. OF INTERIOR IN COOPERATION WITH THE STATE OF NEW MEXICO, NEW MEXICO WATER RESOURCES ASSESSMENT FOR PLANNING PURPOSES 204 (1976).

Embargoes on groundwater exports, such as the New Mexico statute involved in El Paso's case and the Colorado statute invoked by the reciprocity clause in Nebraska's statute, are state law exceptions to the general rule of marketability of water and water rights. These state laws restrict only one type of commerce in water, interstate commerce. Statutes that overtly block the flow of interstate commerce at the state borders are patently unconstitutional when applied to commerce in other commodities or resources, *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624, (1978), whether framed as embargoes or as mandatory reciprocity requirements, *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976); *Hardage* v. *Atkins*, 619 F.2d 871 (10th Cir. 1980). The argument that a state's claim of "public ownership" of a natural resource gives it greater freedom to discriminate against interstate commerce was disposed of in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979).

The rule of law stated in *Hughes* v. *Oklahoma* should be applied to water just as to any other resource. "Beneficial exchange of goods is a motivating force in trade and commerce. It should be equally potent when one of the commodities is water; it should promote commerce whether the two areas are within a single state or are divided by state lines." Corker, *Water Rights in Interstate Streams*, in 2 WATERS AND WATER RIGHTS 295 (Clark ed. 1967). The constitutionality of a state's restrictions upon beneficial exchanges of groundwater exports should not turn upon whether or not that state has adopted the fiction of public ownership. As stated in *City of Altus* v. *Carr*:

> Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the *Pennsylvania* and *West* cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce.

255 F. Supp. at 840.

Finally, Nebraska notes that federal statutes and cases reflect deference to state water law, and suggests that therefore Congress and this Court have authorized the states to prohibit or restrict the interstate marketability of groundwater. The premise of this argument is misstated, and the conclusion is an erroneous nonsequitur. The deference to state water law exhibited in the federal statutes and this Court's opinions is to the right of each western state "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935), *quoted with approval in California* v. *United States*, 438 U.S. 645, 658 (1978). A state's right to choose prior appropriation systems of

water law does not destroy the paramount federal power to protect the federal Commerce Clause interest in navigability. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). There is no basis for concluding that it destroys the federal Commerce Clause interest in freedom of interstate commerce from discriminatory state legislation. On the contrary, this Court has held that, with respect to water just as any other resource, "the powers of the National Government within the limits of those [western] States are the same (no greater and no less) than those within the limits of the original thirteen . . . ." *Kansas* v. *Colorado*, 206 U.S. 46, 92 (1907).[13]

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[13] *Cf. Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (Congressional deference to strong local interest in banking does not authorize Florida prohibition on interstate bank ownership of investment advisory business); and *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (even though Congress has said that solid waste disposal is "primarily the function of state, regional and local agencies," New Jersey's ban on interstate movement of solid wastes violates the Commerce Clause).

CONCLUSION

The Nebraska Supreme Court erred in concluding that the Nebraska statute restricting groundwater exports is exempt from Commerce Clause review merely because Nebraska asserts public ownership of water. State statutes prohibiting or restricting the export of any scarce natural resource are subject to traditional Commerce Clause review, whether or not the state asserts public ownership of the resource.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE
AND
DELMAR MOSS,
Appellants,

v.

STATE OF NEBRASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

BRIEF OF THE NATIONAL AGRICULTURAL LANDS CENTER AND KANSAS CITY SOUTHERN INDUSTRIES AS *AMICUS CURIAE*

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QUESTIONS PRESENTED

I. Whether this Court's recognition of Congressional deference to state water laws, and of the states' preeminent sovereign power to conserve water, should operate to exempt Nebraska Revised Statute § 46-613.01 from review under the dormant Commerce Clause.

II. Whether the State's critical interest in conserving scarce groundwater supplies outweighs any slight burden on commerce imposed by Nebraska Revised Statute § 46-613.01.

III. Whether Nebraska Revised Statute § 46-613.01, which is rationally related to the legitimate state purpose of groundwater conservation, comports with the Equal Protection and Due Process Clauses of the United States Constitution.

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OF THE STATE OF NEBRASKA

BRIEF OF THE NATIONAL AGRICULTURAL LANDS CENTER AND KANSAS CITY SOUTHERN INDUSTRIES, AS *AMICUS CURIAE*

The National Agricultural Lands Center and Kansas City Southern Industries respectfully submit this brief as *Amicus Curiae*, having obtained consent to do so from Appellants and Appellee. Copies of these consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Because of its scarcity, the wise use and conservation of groundwater is of critical importance in the arid western and midwestern states. The need to conserve and protect scarce water supplies is reflected by the comprehensive, complementary groundwater codes of these states. Without preservation of their conservation laws and regulations, arid states will be unable to prevent depletion of scarce water supplies and the resultant threat to the nation's vitality.

The National Agricultural Lands Center (NALC) and Kansas City Southern Industries (KCSI) share a strong interest in this subject.

NALC is a nonprofit organization established to assist state and local organizations and governments in the design and implementation of agricultural resource management programs. The officers of NALC were responsible for the preparation of the recent *National Agricultural Lands Study* – a federal effort co-chaired by the Department of Agriculture and the Council on Environmental Quality – which concludes that the primary role for protecting and conserving agricultural lands must rest with state and local government, not with the federal government. The sound allocation and conservation of water, sought by western and midwestern states, is fundamental to the maintenance and management of agricultural resources. Therefore, NALC urges that the historic role of the states in allocating and regulating water resources be respected, and that the current scheme of western and midwestern water laws be upheld.

KCSI shares NALC's concern for conserving agricultural lands. KCSI is involved in a wide variety of transportation, transportation-related manufacturing,

financial services, real estate and communications industry activities. KCSI's activities are largely dependent on the viability of the Missouri River Basin economy. KCSI's rail and truck transportation systems are particularly affected: approximately 35 percent of KCSI's transportation revenues are derived from the hauling of agricultural and agricultural-related products. Thus, KCSI is vitally interested in maintaining a healthy and predictable agricultural economy in the west and midwest. Current western and midwestern water laws are critical to the stability of this agricultural economy. KCSI's entire range of transportation services could also be adversely affected by the types of interstate and interbasin water transfers that could ensue if Nebraska's statute is overturned. Because its business is centered at its corporate headquarters in Kansas City, KCSI has a direct concern in the future quantity and quality of flows in the Missouri River throughout the entire region. KCSI thus urges that the Nebraska statute challenged in this case be upheld as a vital component of integrated water conservation laws of the western and midwestern states.

SUMMARY OF ARGUMENT

To conserve water in its declining underground aquifers, Nebraska Revised Statute § 46-613.01 (1978) limits out-of-state groundwater transfers. The Nebraska Supreme Court correctly determined that the Nebraska statute does not violate the Commerce, Equal Protection or Due Process Clauses of the United States Constitution.

This Court traditionally has treated water as a unique resource, recognizing its elemental importance to human existence and the viability of the states. The Court has long recognized, as a paramount aspect of their sovereign-

ty, the states' role in conserving and allocating waters for the beneficial use of state citizens. Congress has traditionally and repeatedly deferred the control of water resources to state law. Decisions of the Court have approved this statutory theme of pervasive federal deferral and provide a basis for exempting Nebraska's statute from review under the Commerce Clause.

Even if Congressional deference to state water conservation laws is not recognized, and water is considered to be a traditional article of commerce (or if its regulation otherwise affects interstate commerce), this Court should find that Nebraska's statute does not discriminate against or unduly burden interstate commerce. The statute is not discriminatory, because it affords neighboring states a means to receive and use Nebraska groundwaters. Moreover, any burden imposed by the statute is slight, since only one of Nebraska's neighboring states has a statute that potentially could trigger the denial of Nebraska groundwater. This slight burden is greatly outweighed by Nebraska's need to prevent a critical resource from being irretrievably siphoned out of state and by the central responsibility which Congress has placed upon the states in regulating water. Moreover, no less burdensome legislation would be as effective in achieving this goal. Thus, Neb. Rev. Stat. § 46-613.01 should be upheld under the Commerce Clause.

Nebraska's statute is also fully consonant with both the Equal Protection and Due Process Clauses of the Fourteenth Amendment because it is rationally related to a legitimate state purpose.

Current western and midwestern water statutes serve to create a complementary regional system for the conservation of water. Should this Court fail to uphold the

Nebraska statute, this balance would be upset. If the states' ability to conserve water within their borders is curtailed, the interest of each state would be to acquire, appropriate, and store as much water as possible, as quickly as possible, to protect its citizens from acute water shortages. Such a race to deplete groundwater supplies in the west and midwest would not be in the national interest.

ARGUMENT

I. THE CONSERVATION AND MANAGEMENT OF SCARCE WATER RESOURCES IS OF CRITICAL IMPORTANCE TO THE WESTERN AND MIDWESTERN STATES.

A. *Water Is An Increasingly Scarce Resource.*

The scarcity of water has always been of critical concern to the arid western and midwestern states, and is currently reaching an acute stage. The demand for western water has been accelerating at a rate which threatens to strain existing supplies beyond capacity. Population increases, energy development and growing agricultural production are primary contributors to this exacerbated demand. Without comprehensive, effective water resource management and conservation plans, the western and midwestern states will be unable to prevent the depletion of available water supplies and the resulting destructive impact on the nation's economy. Water scarcity is expected to be our next resource crisis.

Available supplies of water are acquired from two major sources — surface waters and underground waters. Rivers, lakes, and streams provide surface reserves; man-made reservoirs trap much of this water and store it for later use. Groundwater comes from subsurface reservoirs

that have accumulated water over long periods of time.[1] Where surface supplies are inadequate, groundwater is used to satisfy existing needs. On the average, groundwater supplies 20 percent of all freshwater used in the United States.[2] Certain regions, however, particularly areas west of the Mississippi River, rely much more heavily on groundwater.[3]

Groundwater supplies are rapidly diminishing. For example, the Ogallala aquifer, the nation's largest underground reservoir, has been depleting in many areas at the alarming rate of 3 feet per year.[4] The Ogallala underlies the states from Texas to South Dakota, an area which produces nearly a quarter of the total value of U.S. agricultural exports.[5] Researchers have predicted that the Ogallala's entire supply will disappear within 40 years.[6] Depletion of the Ogallala has been even more severe in particular areas. For example, the U.S. Geological Survey has reported that groundwater levels in western Kansas,

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[1] *See* Soil Conservation Service, U.S. Department of Agriculture, *America's Soil and Water: Conditions and Trends* 24 (1980) [hereinafter cited as *America's Soil and Water*].

[2] Comptroller General, General Accounting Office, *Groundwater Overdrafting Must be Controlled* 1 (1980) [hereinafter cited as *Overdrafting*].

[3] For instance, groundwater provides 62 percent of the total water used in Arizona. *Id.*

[4] K. Sheets, *Water, Will We Have Enough to Go Around?*, U.S. News & World Report, June 29, 1981, at 35. [hereinafter cited as *Water*].

[5] *High Plains-Ogallala Aquifer Regional Study*, Congressional Briefing Materials (July 10, 1979).

[6] *Water*, *supra* note 4, at 35. Congress considered the depletion of the aquifer to be so critical to agricultural and economic concerns that it authorized the pending High Plains-Ogallala Aquifer Regional Study, Pub. L. No. 94-587, 90 Stat. 2943.

served by the Ogallala aquifer, have declined more than 62 feet since 1950[7] and it has been predicted that the water table in another area of Kansas will drop an additional 15 to 30 feet by 1988.[8] Arizona authorities report that groundwater levels in certain areas of the state are falling at approximately 7 to 10 feet per year.[9] Similar problems prevail in the other states sharing the aquifer.

Declining groundwater is due, in part, to the fact that groundwater replenishes very slowly.[10] More importantly however, an alarming increase in withdrawals from underground aquifers is posing a threat to the nation's water supply. Overdrafting, the extraction of more water than can possibly be replenished, is being utilized to satisfy accelerating water demands. In 1950, 12 trillion gallons of water were extracted from underground reservoirs. That figure doubled by 1980.[11]

The overdrafting problem is most acute in the western and some midwestern states. As rainfall in the region is generally deficient, measuring as little as 4 inches annually

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[7]L. Dunlop, J. Kume, J. Thomas, *Geohydrology and Model Analysis for Water-Supply Management in a Small Area of West-Central Kansas* (U.S.G.S. 1981).

[8]*Id.*

[9]*America's Soil and Water, supra* note 1, at 27.

[10]While the entire continental United States receives an average of 30 inches of annual precipitation, only 3 inches eventually becomes groundwater. *Id.* at 20, 24.

[11]*The Browning of America,* Newsweek, Feb. 23, 1981, at 26. *See also* U.S. Water Resources Council, *The Nation's Water Resources 1975-2000, Second National Water Assessment* 18, 25 (1978).

in certain areas,[12] these states utilize groundwater as their predominant source of fresh water. Existing supplies of groundwater are being strained, however, due to population increases, energy development, and greater agricultural production.

Western states have become more densely populated in recent years. In 1880, the arid west[13] housed 3 percent of the total population of the United States. By 1970, total population had increased many times and the west's proportion had grown to 14 percent. During the period from 1960 to 1970 alone, the arid west's population rose 27 percent.[14] According to 1978 census data, this growth rate has accelerated even further, with the arid west maintaining many of the country's fastest growing "Sunbelt" urban centers.[15] These metropolitan areas rely heavily on groundwater for their economic development, and thus have contributed to the area's overdrafting problem.

In addition to urban development, increased energy development and use in the west have burdened the available water supply. Newly-developed fuel technologies including oil shale, coal gasification, and coal liquefaction also require substantial water for operation. Other energy sources such as thermal power, petroleum refining, and flue gas desulfurization demand further water. Not only will energy projects, such as coal slurry pipelines, irretrievably divert significant amounts of western and midwestern water, but population growth created by an

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[12]*America's Soil and Water, supra* note 1, at 20.

[13]The term "arid" is used to describe those western regions that receive less than 20 inches of annual rainfall.

[14]D. Sheridan, *The Underwatered West*, 23 Envir. 7 (1981).

[15]U.S. Bureau of the Census, *Population of the Arid West, and Percent of Growth* (1979), *reprinted in* 23 Envir. 7 (1981).

influx of construction workers and energy company employees will place even greater demands on existing supplies. This strain will increase during the coming decade.

Notwithstanding these new competitors, agriculture remains the nation's largest water consumer, accounting for 83 percent of total use.[16] Agricultural output depends on irrigation. The U.S. Department of Agriculture estimated that during the last decade irrigated farm land increased at a rate of 1.4 million acres per year.[17] If the trend continues, agricultural productivity will require ever-increasing amounts of the nation's water supply.

B. *The Effects of Diminishing Water Resources Will Be Severe.*

The decline of available water resources, particularly underground water, threatens the nation's vitality. Agricultural production will suffer the most significant harm. Irrigation is particularly essential for western and midwestern agriculture – five out of every six irrigated acres are located in seventeen western and midwestern states.[18] Average yields and productivity traditionally are higher on irrigated farms, and irrigated agriculture currently accounts for more than one-quarter of the nation's crops.[19] The High Plains region alone accounts for ap-

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[16] *America's Soil and Water, supra* note 1, at 21.

[17] *Id.* at 25.

[18] R. Sampson, *Farmland or Wasteland – a Time to Choose* 156 (1981).

[19] *Id.* at 155-157.

proximately 20 percent of the production of many of the nation's key agricultural commodities.[20]

Excessive pumping of underground water may force a deep cut in agricultural production. Many crops cannot grow without irrigation, and in some areas a return to dryland farming would result in no crop production at all.[21] Economic realities will also make existing water supplies less accessible to the nation's farmers. As water tables decline, more energy is needed to pump the water to the earth's surface, at a far higher cost.[22]

The effects on agriculture of diminishing water supplies are of major importance to local, state, national, and international interests. Not only does U.S. agriculture supply the nation with its daily food, but it exports large quantities of food abroad. Agricultural exports totaled $41.3 billion in 1980, and world demand for U.S. food products is expected to grow by as much as 140% to 250% over the next twenty years.[23] Agriculture's export role enhances the national economy by increasing the foreign exchange rate and reducing the trade deficit.[24] Moreover,

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[20]*Water, supra* note 4. *See also High Plains-Ogallala Aquifer Regional Study,* Congressional Briefing Materials (July 10, 1979).

[21]G. Sloggett, *Declining Ground Water Levels: Extent and Potential Impact on United States Agricultural Production* 13 (Paper presented at the 10th Annual Rocky Mountain Ground Water Conference, Laramie, Wyoming) (May 1, 1981).

[22]*Overdrafting, supra* note 2, at 7; K. Frederick, *Irrigation and the Adequacy of Agricultural Land* (Paper presented at Resource for the Future Conference on the Adequacy of Agricultural Land, Washington, D.C.) (June 19-20, 1980).

[23]U.S. Dept. of Agriculture/Council on Environmental Quality, *National Agricultural Lands Study, Final Report* 14 (1981).

[24]U.S. Dept. of Agriculture/Council on Environmental Quality, *National Agricultural Lands Study, The Protection of Farmland: A Reference Guidebook for State and Local Governments* 32 (1981).

because of growing populations, increasing numbers of people throughout the world depend on American-grown food for survival.

Excessive mining of groundwater also renders existing supplies unusable due to saltwater intrusion. As freshwater is pumped from an aquifer, saline water moves in to fill the void. Saline contamination is difficult to reverse, and can cause permanent damage to the water supply.[25] To date, forty-two states have reported significant saltwater intrusion problems.[26] The greater the withdrawal of underground water, the more severe become the problems of structural damage to the land,[27] and saline contamination of water supplies. Continued overdrafting, if not controlled, may have vast adverse effects on the nation's entire water system.

C. *The Facts of This Case Underscore Western and Midwestern Water Scarcity Problems.*

The Ogallala aquifer, discussed above, is the source of the water in dispute in this case, underlying appellants' property in both Colorado and Nebraska. Appellants initially attempted to obtain Ogallala water from Colorado to irrigate their Colorado land. The Colorado Groundwater Commission denied appellants' permit request, concluding, pursuant to Colo. Rev. Stat. § 37-90-107 (1974), that the Ogallala in that area of Colorado was already being depleted by parties with prior rights and that additional pumping would lead to an unacceptable decline in

[25] *Overdrafting*, *supra* note 2, at 5.

[26] *Id.*

[27] *Id.* at 3, 4.

water tables.[28] Taking advantage of the fact that they happened to own an adjacent land parcel in Nebraska,[29] appellants began pumping from the Nebraska side of the same aquifer, without a permit, into their Colorado parcel. They were subsequently enjoined by the State of Nebraska.[30] Nebraka, like Colorado, faces very serious depletion problems with its share of the Ogallala.[31]

The facts in this case, therefore, highlight the acute shortage of western and midwestern water generally, and Ogallala water in particular.

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[28] *In the Matter of the Application of Sporhase and Moss for a Permit to Construct a Well to Use Water from the Ogallala Formation of the Northern High-Plains Designated Groundwater Basin in Phillips Co., Colo.*, File No. A.D. 6826 (Colo. Groundwater Commission, Aug. 27, 1977). While appellants could have appealed this decision pursuant to Colo. Rev. Stat. § 37-90-115 (1974), they failed to do so. In order to avoid aquifer depletion wars with adjacent states, Colorado is particularly careful to regulate pumping near state lines to avoid infringement on the adjacent state's water. *See Thompson v. Colorado Groundwater Commission*, 194 Colo. 489, 575 P.2d 372 (1978) (*en banc*). The Commission took this policy into account.

[29] Appellant's Colorado land parcel is separated from their Nebraska parcel by a state highway. Joint Appendix at 112 [hereinafter referred to as J.A. at ____].

[30] J. A. at 23. Appellants subsequently alleged that, because Colorado had no reciprocal provision, as required under Neb. Rev. Stat. § 46-613.01, this would have precluded them from obtaining a permit, and appellee agreed. *See Nebraska v. Sporhase*, 208 Neb. 703, 305 N.W. 2d 614 (1981); Colo. Rev. Stat. § 37-90-136 (prohibits export of tributary and non-tributary groundwater).

[31] In Southwestern Nebraska, where appellants sought water, the groundwater decline has been averaging approximately one foot per year. *See* Nebraska Water Service, *Groundwater Levels in Nebraska*, Paper No. 51 (1980).

D. *This Case Threatens Fundamental Conservation Principles.*

In summary, water scarcity problems threaten to escalate into a full-fledged resource crisis. This Court should be extremely cautious in this review as state water laws provide the only systematic structure for water conservation in the west and midwest. The states of that region have enacted remarkably complementary water regulation systems. If the states are denied their ability to conserve their water reserves, the entire region will be denied a key element in its conservation system, since Congress has historically deferred water control to the states, and since the internecine realities of regional water issues have precluded Congressional enactment of any coherent federal conservation scheme.

While the states must undertake more comprehensive water conservation and management if a crisis is to be averted, this case threatens to preclude entirely such an effort. If states with critical water conservation problems are unable to regulate the flow of their waters across their borders, it will be in the interest of citizens in every state to reach for another state's water resources. The result will be a water rush and a corresponding maze of interbasin water transfers that will accelerate the draining of the region. Agriculture and transportation interests which depend on agriculture will be among the first victims.

II. THIS COURT'S RECOGNITION OF THE STATES' SOVEREIGN POWERS TO CONSERVE WATER AND OF CONGRESSIONAL DEFERENCE TO STATE WATER LAWS OPERATES TO EXEMPT NEBRASKA STATUTE § 46-613.01 FROM JUDICIAL REVIEW UNDER THE DORMANT COMMERCE CLAUSE.

A. *The Current System Of Western Water Laws Is Necessary For The Protection Of Scarce Water Supplies.*

In view of the critical shortage of water in the western and midwestern United States, the arid states have an especially compelling need to regulate water supplies.[32] Consequently, the water codes of western and midwestern states manifest a dominant theme of wise use and conservation of a finite resource esential to economic growth and human survival.

The current system of groundwater legislation developed out of dissatisfaction with English common law. England, reflecting its water-rich status, afforded absolute ownership of groundwater to the overlying landowner, who could sell it as he could other property. The basis for the rule was the abundance of water and the belief that the ways of underground water were too mysterious and unpredictable to permit the establishment of fair rules for its use. *See State v. Michels Pipeline Construction, Inc.*, 63 Wisc. 2d 278, 217 N.W. 2d 339, 344

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[32]The arguments in this brief are directed at the ability of the states to exercise conservation controls over water. The arguments made herein are not relevant to situations where a state wastes or abuses water. Nothing in this brief should be construed to imply that a state has the ability to abuse its trusteeship position over its water, by, for example, polluting it or selling it for use in interbasin transfers, which would prejudice the interests of states or users sharing the water source.

(1974), *citing Acton v. Blundell*, 12 Mees. & W. 324, 350, 351, 152 Eng. Rep. 1223 (Ex. 1843).

The English rule generally was followed by American courts through the mid-nineteenth century. However, the need to protect groundwater from wasteful depletion, as well as the developing understanding of the hydrologic cycle, led the courts to reject the underpinnings of the rule.

By the turn of the century courts steadily turned away from the English rule and began applying the rule of "reasonable use." 2 Wiel, *Water Rights in the Western States* 973 (3d ed. 1911). The rule of reasonable use recognizes that the overlying landowner has a proprietary interest in groundwater, but sharply restricts the extent of the landowner's control and the incidents of ownership. Under the rule, the nature of the property right is usufructuary rather than absolute, as under the English rule. 1 Wiel, *supra*, at 20-21. Private usufructuary rights exist by virtue of, and are subject to, the law of the place where the water is located. Trelease, *Government Ownership and Trusteeship of Water*, 45 Calif. L. Rev. 638 (1957).

Seventeen western and midwestern states, including Nebraska, currently govern groundwater rights through the superimposition of groundwater appropriation statutes upon the common law foundation of either reasonable use or absolute ownership. *See, e.g.*, Kan. Stat. §§ 82a-701 *et seq.* (1977 and Supp. 1980); Mont. Rev. Codes Ann. §§ 85-2-501 *et seq.* (1978-79); Nev. Rev. Stat. §§ 534 *et seq.* (1979); N.D. Cent. Code §§ 61-01-01 *et seq.* (1977). The water laws of appropriation states share certain basic provisions: (1) the waters are declared to be public, state-controlled property; appropriators gain only usufructuary rights, not ownership; (2) groundwater may be appropriated for beneficial use; and (3) permits are re-

quired in order to appropriate groundwater. White, *Reasonable State Regulation of the Interstate Transfer of Percolating Water,* 2 Nat. Resources Law 383, 402 (1969). Clearly, water has not been treated by these states as a traditional article of commerce. Rather, states act in a trusteeship role, exercising control, not ownership, over the water, contingent upon the extent of the interests and rights of states that share the aquifer or surface flow.

To respect and accommodate their common water interests, fourteen states (thirteen in the west or midwest) have statutes regulating the diversion of water outside the state.[33] These statutes are an essential part of the network of limitations on water use west of the Mississippi, which begin with statutory and regulatory limits over the way individual landowners use water and conclude with an extensive system of agreements between states worked out through interstate compacts or equitable apportionment orders. Nearly all water in the area is from sources shared with the other states – either shared river basin systems or shared underground formations. The western and midwestern states are obliged (by compacts or orders, which supersede other state laws) to recognize each other's water rights, although each state retains rights to control for its citizens the limited amounts of water not controlled by other states. The state water diversion statutes, such as Nebraska's, are an intrinsic part of this legal network; they

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[33]*See* Ariz. Rev. Stat. Ann. § 45-153 (Supp. 1981); Cal. Water Code § 1230 (West 1971); Colo. Rev. Stat. §§ 37-81-101 *et seq.* (Supp. 1979), § 37-90-136 (1974); Idaho Code §§ 42-401 *et seq.* (1977); Kan. Stat. § 82a-726 (1977); Mont. Rev. Codes Ann. § 85-1-121 (1978-79); Neb. Rev. Stat. § 46-613.01 (1978); Nev. Rev. Stat. §§ 533.515 *et seq.* (1979); N.J. Stat. Ann. § 58:3-1 (West 1966); N.M. Stat. Ann. § 72-12-19 (1978); Or. Rev. Stat. § 537.810 (1977); Utah Code Ann. § 73-2-8 (1980); Wash. Rev. Code Ann. §§ 90.03.300, 90.16.110, 90.16.120 (1972); Wyo. Stat. § 41-3-115 (1977).

enable each state, acting as a trustee, to exercise limited controls over those waters to which they are entitled (either through the doctrine of equitable apportionment or by compact), without out-of-state infringement on its trust prerogatives.

Central to the interstate compacts and to the equitable apportionment decisions of this Court is the assumption that a state may reserve for use within its borders the waters that have been equitably apportioned to it. *See, e.g., Wyoming v. Colorado*, 353 U.S. 953 (1957) (Colorado apportioned water for in-state use only); Upper Colo. River Compact, *approved*, 63 Stat. 31 (1949) (allocations to each state of proportions of the river; no state can exceed apportioned use to the detriment of another). The compacts and equitable apportionment decisions would be meaningless without this assumption. Striking the Nebraska statute would eliminate the state's ability to protect its waters and would also eliminate an essential part of the mutual water accommodation system built up over the past century in the west and midwest.

B. *The Nebraska Statute Should be Exempt From Judicial Review Under the Dormant Commerce Clause.*

The power to allocate and conserve water resources is a vital attribute of state sovereignty, since water is the one natural resource essential to the very existence of the state. Accordingly, this Court has long recognized the paramount interest of a state to conserve waters for the use of its citizens. Writing for the Court in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), Mr. Justice Holmes observed that "few public interests are more obvious, indisputable, and independent of particular theory

than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit . . . ." *Id.* at 356.[34] This Court should continue to accord the conservation of water a unique position in federal-state relations,[35] and should refuse to examine Nebraska Revised Statute § 46-613.01 under traditional commerce clause analysis.[36]

The history of Congressional deference to state water law also counsels deference to Nebraska's statute. Con-

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[34]In *Hudson County,* this Court upheld a New Jersey statute that prohibited the export of surface water. In holding the statute to be outside the reach of the Commerce Clause, the Court found that the qualified right to use water, given by the state, is not expanded into the right to treat water as an article of commerce, merely by the desire to use the water in interstate commerce. 209 U.S. at 357. *See also West v. Kansas Natural Gas Co.,* 221 U.S. 229 (1911) (Court, discussing *Hudson,* explicitly distinguished water from natural gas in finding that Oklahoma could not constitutionally prohibit the export of natural gas). *City of Altus v. Carr,* 255 F.Supp. 828 (W.D. Tex.), *aff'd per curiam,* 325 U.S. 35 (1966), did not affect the validity of *Hudson County,* because Texas adhered to the English common-law view that absolute ownership of groundwater belonged to the landowner. *See City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798, 801 (1955). Captured groundwater was, under Texas law, an article of commerce. Since water was not treated as an article of commerce under the applicable law in *Hudson,* and since it is not so treated in Nebraska, *Hudson* remains precedent for upholding Nebraska's statute.

[35]In *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), this Court was persuaded in part by considerations of state sovereignty to exempt from review under the Commerce Clause South Dakota's sales of cement from a state-owned and operated cement plant. 447 U.S. at 438, and nn. 10 & 11. Given the much more extreme sovereign interest of a state in preserving and allocating the one resource essential for its continued existence, state control over water should be treated with at least equal deference as state control over state-owned cement.

[36]*See* U.S. Const. art I, sec. 8, cl. 10.

gress has consistently recognized the need to observe state water law, and has affirmatively acted to protect state water law from federal encroachment. For example, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §§ 321 *et seq.*, which encouraged reclamation of public desert lands in the west, granted plenary control to the states over all nonnavigable waters formerly part of public desert lands. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Similarly, Congress expressly indicated that reclamation would be controlled by state water law in the Reclamation Act of 1891, 26 Stat. 1095, as amended, 43 U.S.C. § 946; the Act of Feb. 26, 1897, 29 Stat. 599; and the Reclamation Act of 1902, § 8, 43 U.S.C. § 383. *See also* the Act of July 26, 1866, c. 262 § 9, 14 Stat. 253, 30 U.S.C. § 51 and 43 U.S.C. § 661, and the Act of July 9, 1870, c. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52, 43 U.S.C. § 661 (U.S. to recognize, on federal lands, vested water rights established by state law).

This Court recently emphasized Congress' intent to vest in the states primary control over their waters. In *California v. United States*, 438 U.S. 645 (1978), the Court stated:

> [t]he history of the relationship between the Federal Government and the states in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

438 U.S. at 653.

The Court in *California* relied on consistent Congressional deference to state water law in holding that the Reclamation Act of 1902 allows the states to impose conditions on the control, appropriation, use or distribution of water from a federal reclamation project, so long as

they are not inconsistent with specific Congressional directives regarding the project. *Id.* at 674-76. In examining the history and extent of Congressional deference, the Court quoted from the Senate Report on the McCarran Amendment, 43 U.S.C. § 666, which subjects the United States to state law and state court jurisdiction in water adjudications:[37]

> In the arid western states for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, *which state is vested with the primary control thereof.*
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> * * * * *
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> *Since it is clear that the states have the control of water within their boundaries,* it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper administration of water law as it has developed over the years. S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

Id. at 678-79 (emphasis added).

The "proper administration of water law" would be threatened if the Nebraska statute is successfully challenged in this case. Invalidating the statute would throw into disarray Nebraska's comprehensive plan for conserving water, and would cast doubt on the groundwater conservation schemes in all the western and midwestern states. Those states would be helpless to control the inevitable

[37]At the time of the enactment of the McCarran Amendment, approximately eleven states had statutes limiting out-of-state water diversions.

"race to the bottom of the aquifer" that would result from a holding by this Court that states may not control out-of-state diversions of scarce groundwater.

In light of the critical sovereign state interest involved and the repeated federal statutory deference to state control of water, this Court should exercise restraint in reviewing Nebraska's challenged regulation of groundwater. *California,* in its broad construction of the federal statutes deferring to state water control, empowers the states to conserve and manage their water resources and is fully applicable in this case. Thus, the application of the dormant Commerce Clause is not needed here to prevent states from burdening commerce, since Congress has already "struck the balance it deems appropriate." *Merrion v. Jicarilla Apache Tribe,* ____ U.S. ____, 50 U.S.L.W. 4169, 4175 (1982). Accordingly, this Court should decline to review the Nebraska statute under the Commerce Clause.

III. SHOULD THIS COURT DETERMINE THAT REVIEW UNDER THE COMMERCE CLAUSE IS APPROPRIATE, REGULATION OF GROUNDWATER UNDER NEBRASKA REVISED STATUTE § 46-613.01 DOES NOT UNDULY DISCRIMINATE AGAINST OR BURDEN INTERSTATE COMMERCE.

Given the vital importance of water to the western and midwestern states and the concomitant necessity for the states to conserve scarce supplies, it is clear that Nebraska's statute does not facially discriminate against interstate commerce, in contrast to the statutes struck down in *Hughes v. Oklahoma,* 441 U.S. 322 (1979) and *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978).[38]

[38]The burden to show discrimination against interstate commerce rests with the party challenging the validity of the statute. *Hughes,* 441 U.S. at 336. Appellants have not even alleged, much less made *any* showing, that the Nebraska statute discriminates against interstate commerce.

In each of these cases, the state statutes placed absolute bars on interstate commerce: the statute in *Hughes* barred out-of-state transport of minnows, 441 U.S. at 337, while the statute in *City of Philadelphia* barred transport of waste into the state, 437 U.S. at 627. Moreover, neither of the states placed *any* restrictions on similar dispositions of the regulated articles intra-state. *Hughes,* 441 U.S. at 338, *City of Philadelphia,* 437 U.S. at 628-29.

Nebraska's reciprocity provision is in no way comparable to an absolute bar on interstate transport; in fact, it provides sister states with the opportunity to receive and use Nebraska groundwater within their borders. In addition, the Nebraska statute places restrictions on the use of groundwater within the state, as well as on its transport out of the state.

Moreover, the purpose of reciprocity provisions in statutes such as Nebraska's is not discrimination, but cooperation in a regional effort to maintain a stable system of western water use and management. Preventing state efforts to condition export of scarce water supplies on reciprocity would undermine conservation efforts and provide an incentive for rapid and maximum use of water by other states and private citizens.

Finally, even were this Court to find that the Nebraska reciprocity provision does operate to discriminate against interstate commerce, the statute should be upheld because it utilizes the least discriminatory means available for the achievement of a concededly legitimate purpose. The Nebraska permit requirement for export of groundwater is part of a comprehensive legislative scheme for the conservation and use of groundwater. *See* Memorandum Opinion of the District for Chase County, Nebraska (Dec. 17, 1979). J.A. at 19. Thus, the statute is entirely distinguishable from those involved in *Hughes* and *City of*

Philadelphia, where this Court found that in-state users of minnows and landfill sites were not subject to conservation measures. *See* 441 U.S. at 338; 437 U.S. at 629. The Nebraska statute, in contrast, clearly does not "force those outside the state to bear the full costs of 'conserving' . . . ," 441 U.S. 337, because it imposes many restrictions on instate use of groundwater. J.A. at 19.

That Nebraska has chosen the least discriminatory means available to protect its groundwater from being squandered is clear for other reasons as well. To be fully achieved, the goal of conservation must prevent wasteful use in-state and uncontrollable diversions out-of-state. To prevent the latter, Nebraska has not flatly prohibited the export of groundwater. Rather, it has conditioned export on reciprocity — a condition necessary to protect against diversions of groundwater to states that prohibit exports of their waters. Irretrievable out-of-state diversions of water would clearly contravene the purpose of conservation. It would be unwise to require a state to sacrifice a scarce and critical natural resource essential to its own growth only to promote that same kind of growth in a sister state. *See generally Kansas v. Colorado,* 206 U.S. 46, 117-18 (1906). Thus, having chosen the least discriminatory means available for the conservation of its waters, Nebraska should not have § 46-613.01 of its water code stricken as unconstitutionally discriminatory.

Moreover, by conditioning out-of-state transport on reciprocity, the Nebraska statute does not unduly burden interstate commerce. The prevailing test for assessing the constitutionality of the burden imposed by a state regulation under the Commerce Clause was articulated by this Court in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). Under the *Pike* test, a statute which does not discriminate

against, but only incidentally burdens interstate commerce, will be held constitutionally valid,

> unless the burden imposed on [interstate] commerce clearly outweighs the putative local benefits. If a legitimate local purpose is found, then the question is one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities. [citations omitted].

Id. at 142. Nebraska's permit requirement for the exportation of groundwater clearly satisfies this balancing test.

Nebraska Revised Statute § 43-613.01 was passed in 1967 and revised in 1969 as part of a systematic revision of Nebraska's water management and conservation laws, after major legislative studies, extensive hearings in Nebraska and surrounding states, and careful review of the extent of Nebraska's groundwater problems.[39] The reciprocal agreement language in the legislation also, in part, reflected the outcome of negotiations with the state of Kansas on how best to encourage groundwater exchanges while conserving water supplies.[40] A floor statement from a leading proponent of the 1969 law illustrates the extent and the legitimacy of the conservation concerns behind the entire statute:

> We are going to have a water problem. I do considerable irrigating myself and . . . I am almost

[39]Neb. Sess. Laws Chapt. 281, at 759 (1967) (Legis. Bill 415); Neb. Sess. Laws, Chapt. 9, at 99 (1969) (Legis. Bill 1357); Hearings of the Committee on Agriculture, Neb. Legis., 19 *et seq.* Introducer's Statement, May 1, 1969).

[40]Statement of Sen. Ziebarth, 4313-4314 (Neb. Legis. floor debates, Aug. 25, 1969).

> sure that we are going to run out of underground water, not clear out but we are going to be short. And then, we are going to wonder why we didn't do something thirty, forty, or fifty years ago, or ten years ago or five years ago. This . . . legislation is probably one of the most important activities that we are participating in this year . . . .[41]

Appellants concede that the State of Nebraska has a legitimate local purpose underlying its groundwater regulation — to conserve and manage a scarce natural resource. *App. Brief* at 19, 26. Yet, in reliance on *Great Atlantic & Pacific Tea, Inc. v. Cottrell,* 424 U.S. 366 (1976), appellants contend that it "borders on the frivolous" to claim that Nebraska's reciprocity provision serves the purpose of conserving and managing water resources. *App. Brief* at 21. However, *Cottrell* is so clearly distinguishable from the instant case that it is simply inapplicable.

In *Cottrell,* this Court reviewed a statute which prohibited in-state sales of out-of-state milk absent reciprocity by the sister state. 424 U.S. at 367. The Court found that the challenged provision actually *disserved* its purported objectives of maintaining state health standards, since milk of a lower quality could be sold in Mississippi if a reciprocal agreement existed. 424 U.S. at 375. Since Nebraska statute under *no* circumstances would disserve the conservation of Nebraska's water, appellants' reliance on *Cottrell* is misplaced. Indeed, it is clear that the purposes of water conservation and management are precisely served by a statute which seeks to prevent water from being irretrievably siphoned out-of-state.

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[41]Statement of Sen. Nore, 4341-4342 (Neb. Legis. floor debates, Aug. 25, 1969).

Further, appellants' argument that the reciprocity clause does not guarantee a return of water to Nebraska is not on point. *See App. Brief* at 22. The standard of review does not require absolute guarantees of success. Rather, the standard of review is whether a legitimate purpose is served by the statute, and if so, whether the incidental burden imposed by the statute is exceeded by its benefits. *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1978).

Nebraska's interest in maintaining a comprehensive plan for the management and conservation of water is obviously legitimate and its benefits far outweigh the incidental burden imposed on interstate commerce by Nebraska Revised Statute § 46-613.01. Indeed, the interest in protecting the supply of water ranks foremost among a state's legitimate goals, since water is such a vital resource. *See Hudson County Water Co.*, 209 U.S. at 356. Congress' consistent recognition, discussed above, of the need for states to play the central role in water regulation, underscores the importance of this interest. Given the critical nature of this state interest, the burden that will be tolerated on interstate commerce should be a heavy one.

In addition, the reciprocity provision here in no way acts as an absolute bar to the export of water; it merely conditions export on the existence of reciprocal rights to groundwater from the receiving state. A review of the groundwater statutes of adjoining states reveals that, at most, only Colorado's restrictions on export of its groundwater would even potentially trigger the denial of a permit to export Nebraska water.[42] The negotiations that took place between Nebraska and Kansas over the terms of their reciprocity requirements, as well as the extensive network of interstate compacts reached between the states,

[42] *See* Colo. Rev. Stat. § 37-90-136 (1974) (prohibits export of tributary or nontributary groundwater).

demonstrate that the limitations in Nebraska's statute can be accommodated.

Any resultant burden that is imposed on commerce by the Nebraska statute is far outweighed by the local interest involved and by the lack of effective alternatives. It is manifestly necessary for states, especially those in arid regions, to be able to control the rate and circumstances under which their scarce supplies of water are depleted.[43] In light of the competing and increasing agricultural, energy, municipal, and industrial demands for already over-appropriated water supplies, a Court-imposed constitutional mandate for unrestrained export of water could literally sap the life of the western and midwestern states. Thus, the Nebraska requirement that groundwater not be exported absent reciprocity from the receiving state should be upheld as a reasonable restriction on interstate commerce.

IV. NEBRASKA REVISED STATUTE § 46-613.01 IS FULLY CONSONANT WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. *The Statute Does Not Constitute a Denial of Equal Protection of the Laws.*

The standard of judicial review under the Equal Protection Clause[44] requires that in order for a state statute to withstand judicial scrutiny, the classification made must be rationally related to the achievement of the statutory

[43] *See generally* Corker, *Can a State Embargo the Export of Water by Transbasin Diversion?* 12 Idaho L. Rev. 135 (1976); Comment, *Do State Water Anti-Exportation Statutes Violate the Commerce Clause? or Will New Mexico's Embargo Law Hold Water?* 21 Nat. Res. J. 617 (1981); Comment, *"It's Our Water!" – Can Wyoming Constitutionally Prohibit the Exportation of State Waters?* 10 Land & Water L. Rev. 119 (1974).

[44] U.S. Const., amend. XIV.

purposes. *Minnesota v. Clover Leaf Creamery*, ____ U.S.____, 101 S.Ct. 715, 723, *reh. denied*, 101 S.Ct. 1735 (1981). The Equal Protection Clause is satisfied so long as the Court concludes that the state legislature could have rationally decided that its regulation might serve a legitimate state purpose. *Id.* at 725.

Appellants concede that Nebraska's objective of groundwater conservation for the public welfare is a legitimate state purpose. *App. Brief* at 19, 26. Therefore, the narrow issue remaining for this Court to determine is whether the legislative classification between appropriators in a state offering reciprocity and those in a state which does not offer reciprocity is rationally related to the achievement of conservation of Nebraska ground water.[45]

In *Clover Leaf*, the parties challenging the statute provided impressive empirical evidence at trial to prove that the probable consequences of the regulation would in fact be contrary to the state's purpose. *Id.* at 723. However, this Court, applying the "rational basis" test, held that a party must *convince* the Court that the legislative facts on which the classification is based could not reasonably have been conceived to be true by the legislative decisionmaker. *Id.* at 724.

Appellants in the instant case have not met this burden. It was clearly rational for the Nebraska legislature to have decided that the preservation and conservation of groundwater would be served by permitting its transport, if at all, only to those states where reciprocal access to ground-

[45]While appellants make the unsupported contention that "any governmental acts which treat people in a dissimilar manner are unconstitutional" under the Equal Protection Clause, *App. Brief* at 26, this is *not* the standard by which this Court reviews a statute under the Equal Protection Clause. *Clover Leaf*, 101 S.Ct. at 724.

water is available. Accordingly, the Nebraska statute satisfies the requirements of the Equal Protection Clause.

B. *The Statute Does Not Constitute a Substantive Due Process Violation*

The Nebraska statute regulating the use of groundwater will withstand judicial scrutiny under the Due Process Clause[46] if it bears a rational relationship to a permissible state objective. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (upholding land use regulations under the Fourteenth Amendment).

As discussed above under equal protection analysis, Nebraska's regulation of groundwater use to enhance its conservation is clearly a permissible state objective. Moreover, the Nebraska legislature rationally concluded that in order to foster this goal, groundwater should not be permitted to be siphoned off into a state which does not make its groundwater available for use in Nebraska. Therefore, appellants cannot meet the burden for striking down the statute as a violation of due process.

Appellants' contention that the reciprocal provision unreasonably subjects them to decisions of the legislature of other states is erroneous, and unsupported by case law.[47] Nebraska's statute does not delegate any of its legislative authority to other states. The Nebraska legislature conclusively arrived at the initial determination that it does not serve the goals of groundwater conservation to permit the transport of Nebraska groundwater to a

[46]U.S. Const., amend. XIV.

[47]Even if the reciprocal provision could be viewed as subjecting appellants to the contingencies of other states' laws, a legislature is within its powers in predicating the operation of a statute upon the occurrence of contingencies beyond the legislature's control. *See United States v. Bishop*, 555 F.2d 771 (10th Cir. 1977).

state that does not make its groundwater available for use in Nebraska. Moreover, even if a state were to permit such reciprocal rights, this facts satisfies only one of the conditions for granting a permit to transport groundwater out of Nebraska. The ultimate decisions as to the reasonableness of the withdrawal and use, and its effects on conservation and the public welfare, still lie within the state of Nebraska, in the Director of Water Resources.[48]

CONCLUSION

For each of the foregoing reasons, this Court should affirm the decision of the Nebraska Supreme Court.

Respectfully submitted,

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Date: February 13, 1982

[48]Appellants also suggest that a taking or deprivation occurs as a result of the Nebraska statute. *App. Brief* at 24, 26. However, they fail to demonstrate any liberty or property right on which to base this claim. Clearly, the tenuous relationship between the Nebraska statute and any reduction in the value of appellants' land will not support a takings claim. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979). This claim is particularly tenuous in light of Colorado's earlier denial of groundwater to appellants.

Amicus Brief

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No. 81-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOY SPORHASE AND DELMER MOSS
INDIVIDUALLY AND AS REPRESENTATIVES OF
SPORHASE AND MOSS,
Appellants,

v.

STATE OF NEBRASKA EX REL.
PAUL L. DOUGLAS, ATTORNEY GENERAL,
Appellee.

On Appeal from the Supreme Court of the State of Nebraska

BRIEF OF THE NATIONAL WILDLIFE FEDERATION, NEBRASKA WILDLIFE FEDERATION, AND COLORADO WILDLIFE FEDERATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the State of Nebraska, in limiting the right to transport ground water out of the State to persons applying sound conservation practices and otherwise acting in the public interest, has acted within the bounds of the Commerce Clause of the United States Constitution.

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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the National Wildlife Federation, Nebraska Wildlife Federation and Colorado Wildlife Federation file this brief as Amici Curiae in support of Appellee. Letters of consent from counsel for the parties have been filed with the Clerk.

The National Wildlife Federation (NWF) is a nonprofit membership organization incorporated in 1939 under the laws

of the District of Columbia. NWF is the largest nongovernmental conservation education organization in the world, and has affiliate organizations in all fifty states. Its 4.5 million members and supporters are dedicated to the wise use and conservation of the natural resources of North America.

The Nebraska Wildlife Federation and the Colorado Wildlife Federation are state affiliate organizations of NWF. NWF and its affiliates have a longstanding interest in the protection of the nation's water resources which our members use for hunting, fishing and recreation. The Federation, through its Water Resources Program, has actively opposed the building of unnecessary and environmentally harmful dams and waterways. We have advocated the protection of wetlands, the maintenance of instream flows, and the enforcement of water quality standards. Our legislative and legal initiatives are coupled with a broad educational program aimed at building a stronger public appreciation of the importance of careful management of our water resources.[1]

SUMMARY OF ARGUMENT

In response to growing concern over the depletion of ground water in the arid Western States, the State of Nebraska undertook in 1967 and 1969 a systematic revision of its water management and conservation laws. The product of that review was, in part, the Nebraska ground water management statute, Neb. Rev. Stat. § 46-613.01 (Reissue 1978), which appellants seek to invalidate.

The statute provides for the intelligent management and conservation of limited ground water supplies by establishing two basic conditions for the interstate transport of ground water. First, the person seeking to remove ground water from the State must show that the withdrawal is reasonable, not contrary to the conservation and use of ground water, and not

[1] Last month's issue of the Federation's national membership publication featured a story on ground water depletion. *Running on Empty?*, National Wildlife, Dec.-Jan. 1982, at 42-46.

otherwise detrimental to the public welfare. (This requirement is hereinafter referred to as the conservation requirement.) Second, such person must show that the State in which the ground water is to be used grants reciprocal rights to persons seeking to transport ground water into Nebraska. (This requirement is hereinafter referred to as the reciprocity requirement.) Appellants argue that these requirements constitute an undue burden on interstate commerce.

In the case below, the Supreme Court of Nebraska ruled that under Nebraska law ground water is not an article of commerce, and, therefore, that the Nebraska ground water management statute does not trigger Commerce Clause strictures. Should this Court overrule the Nebraska Supreme Court on that point, the question of the constitutionality of both the reciprocity requirement and the conservation requirement of Nebraska's ground water management statute will be reached.

The arguments for the constitutionality of the reciprocity requirement have been made in other briefs before this Court. In this brief, Amici wish to focus on the narrow question of the constitutionality of the conservation requirement under the Commerce Clause. (We do not address the question whether the statute violates the Due Process or Equal Protection provisions of the Constitution.)

Amici believe that the statute's conservation requirement meets the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) and restated in *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) in that the local benefits flowing from the statute outweigh its incidental burden on interstate commerce and that alternative means of promoting the local purposes are not available.

In sum, while Amici express no view as to the correctness of the Nebraska Court's holding that ground water is not an article of commerce or as to the constitutionality of the reciprocity requirement, Amici believe that the conservation requirement should be upheld in any event. Should this Court invalidate the reciprocity requirement, it should nevertheless uphold the conservation requirement and remand the case to the State Court for a determination of severability.

ARGUMENT

I. THE CONSERVATION AND MANAGEMENT OF SCARCE GROUND WATER SUPPLIES IS OF CRITICAL IMPORTANCE TO THE WEST.

Fresh water is our nation's most essential resource. In 1975 Americans consumed 106 billion gallons of fresh water a day using it to produce our electricity, to irrigate our crops, to forge our steel, and to quench our thirst. Mosher, *If There's a National Water Crisis, You Can't Tell it in Washington,* National Journal, July 25, 1981, at 1333. So vital is this resource to our nation's health and economy that we have built two million dams, drained a hundred million acres of wetlands, and drilled millions upon millions of wells to capture and control its distribution. Canby, *Water, Our Most Precious Resource,* National Geographic, Aug. 1980, at 148.

Yet, as important as it is to this nation, nowhere is water considered more precious than in the arid West. With sixty percent of this nation's land mass it receives but a scant twenty-five percent of its moisture. *Id.* This misallocation of precipitation has forced the Western States to depend heavily upon ground water resources. For instance, ground water supplies seventy-five percent of the total water consumed in Texas, sixty-two percent in Arizona, and forty percent in California. Sheridan, 23 Environment, March 1981, at 8.

With rivers such as the Colorado already oversubscribed, the West's continued dramatic growth threatens to strain its diminishing underground reserves. The Ogallala aquifer which provides the ground water for the High Plains area of Texas, New Mexico, Colorado, Oklahoma, Kansas and Nebraska currently experiences overdraft[2] of fourteen million acre-feet

[2] Overdrafting is the extraction of ground water in excess of the net recharge of the aquifer over a long period of wet and dry years constituting a climatic cycle. Ground water discharges include seepage to streams, flow from springs and seeps, and evaporation and transportation, as well as extraction from wells and drains. Ground water recharges include deep percolation from precipitation, seepage from streams and lakes, and subsurface underflow, as well as artificial recharges from deep percolation from irrigation and water spreading, seepage from canals and reservoirs, and recharge from recharge wells. *Ground Water Manual,* Government Printing Office, 1981, at 4.

annually, an amount about equal to the annual natural flow of the Colorado River. 1 *The Nation's Water Resources 1975-2000,* Dec. 1978, at 18. Hydrologists conclude that at this rate the Ogallala aquifer will be depleted in 40 years. *The Browning of America,* Newsweek, Feb. 23, 1981, at 30.

Continued long term overdrafting of ground water resources results in the following problems: (1) fish and wildlife losses, (2) losses to other water users, (3) saltwater intrusion, (4) land subsidence, (5) increased energy consumption and decreased energy production, and (6) social and economic disruption.

During the dry summer months some streams and lakes are partially or entirely dependent on ground water discharge. Extensive overdrafting dries up these streams and lakes resulting in the loss of the fish and wildlife which depend on them. Some of the most productive waterfowl habitat in the country is located in the "prairie potholes" of North and South Dakota and Nebraska. Studies have shown that these wetland areas depend directly upon water table levels, and are thus vulnerable to overdrafting. Sloan, *Prairie Potholes and the Water Table,* U.S. Geological Survey Professional Paper 700-B, 1970, at D227-231.

These reductions in stream flow also interfere with the rights of surface owners. For instance, in 1956 the State Engineer of New Mexico closed the Rio Grande River Basin to additional ground water users because the proposed agricultural development threatened to reduce the flow of the Rio Grande, a flow already fully committed to surface water users. *Ground Water Overdrafting Must Be Controlled,* General Accounting Office, Sept. 12, 1980, at 6.

Most of the nation's largest sources of fresh ground water are in close proximity to natural bodies of saline ground water. *Id.* at 5. When fresh water is withdrawn faster than it is replenished, changes in hydrologic pressure can cause the movement of saline water into fresh water aquifers. The resulting contamination of fresh ground water can render a part or all of the water in an aquifer unusable. And because of the relatively slow movement of ground water, saltwater intrusion

may damage ground water for many decades. *Id.* Continued overdrafting then not only depletes the current supply of ground water, but also reduces the amount of water available for future consumption. Significant saltwater intrusion has already occurred in forty-two states, including California and Texas. *Id.*

When large amounts of water are extracted from underground aquifers the surrounding surface and subsurface soils tend to compact and settle. Such subsidence has already caused costly structural damage in California, Texas, and Arizona. For instance, Texans have pumped so much water from the ground beneath Houston that subsidence has cracked buildings, disrupted pavements, caused damage to well casings, submerged coastal lowlands, and forced the abandonment of homes because of invading seawater from Galveston Bay. *Id.* at 3. Continued and uncontrolled overdrafting exacerbates the damage caused by subsidence and increases an area's vulnerability to floods.

Because overdrafting of a ground water aquifer causes the level of the aquifer to decline, deeper wells must be drilled requiring more energy to pump the water to the surface. For instance, during World War II ground water could be found at a depth of forty-five feet in Kern County, California. By 1976 ground water in that area had dropped to a depth of 200 feet. *Id.* at 7. The resulting increase in energy demanded to lift the water from further beneath the ground not only reduces the amount of energy available to other consumers, thereby increasing the price of energy, but also fuels inflation, since agriculture, which is heavily dependent on ground water, translates increases in water costs into higher market prices.

In addition to increased energy consumption, overdrafting decreases energy production. The production of oil from shale and coal-slurry require vast amounts of water. A reduction in the amount of water available obviously limits the production of energy by these methods.

Continued overdrafting eventually results in complete exhaustion of the water resource. Ground water exhaustion in the

West, which produces sixty-six percent of the nation's cotton, thirty-nine percent of its barley, and twenty-one percent of its wheat, will have catastrophic effects on the nation's economy. Sheridan, Environment, March 1981, at 7. For instance, in Colorado preliminary studies indicate that forty percent of its irrigated acreage will be lost by the year 2020. *Depletion of Underground Water Formations Imperils Vast Farming Region*, New York Times, Aug. 11, 1981, at B4. Such drastic reductions in this nation's farmlands will result in decreased production, higher prices, and increased unemployment as farmers and farm workers are driven from the land.

In response to this threat to the State's ecology and economy, Nebraska has undertaken a comprehensive revision of its water laws. One of the measures resulting from that systematic review is the ground water management statute, Neb. Rev. Stat. § 46-613.01 (Reissue 1978), which Appellants seek to invalidate.

II. THE STATE OF NEBRASKA, IN LIMITING THE RIGHT TO TRANSPORT GROUND WATER OUT OF THE STATE TO PERSONS APPLYING SOUND CONSERVATION PRACTICES AND OTHERWISE ACTING IN THE PUBLIC INTEREST, HAS ACTED WITHIN THE BOUNDS OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3, prohibits the States from enacting legislation which unduly restricts the free flow of commerce among the States. This restriction on the States' power to regulate is rooted in the fundamental commitment to a free national marketplace embodied in our federal system.[3]

[3] Mr. Justice Jackson stated in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949), "This principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units." Mr. Justice Cardozo observed in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), "The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

The general rule for determining whether a state statute imposes an undue burden on interstate commerce was laid out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) and summarized in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

> Under that general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' [citing *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353 (1977)].

Hughes v. Oklahoma, supra at 336. The application of this rule to Nebraska's ground water management statute demonstrates that it does not impose an undue burden on interstate commerce.

A. The statute's conservation requirement is applied evenhandedly and imposes no more than an incidental burden on interstate commerce.

1. The fact that the statute's conservation requirement is triggered by the interstate transport of ground water constitutes a rational threshold test because ground water transported out of state poses a greater threat to water supplies.

As *Bruce Church* and *Hughes* make clear, the discriminatory effect of a challenged statute must be assessed at the outset. The level of scrutiny, however, may vary depending

on the type of legislative scheme involved. In some cases the nondiscrimination test will be quite strict. As this Court indicated in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." 437 U.S. at 624. On the other hand, some facially discriminatory statutes have been routinely upheld. "It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce." *Id.* at 628.

It is the commitment to a free national marketplace embodied in the Commerce Clause which reconciles the Court's swiftness in striking down protectionist statutes, while upholding other, sometimes discriminatory measures which do not work at cross purposes with the goal of a national economy.

Of which type, then, is the statute at issue here? Appellants would have this Court believe that Nebraska's ground water management statute is no more than a bold attempt by the State to reserve to its own citizens the underground bounty of its aquifers.

This suggestion demonstrates only Appellants' failure to perceive the unique qualities of ground water. Unlike the minnows in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), the waste disposal sites in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), and the natural gas in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) and *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1910) (each of which involved an attempt by the State to arbitrarily reserve to its citizens the natural resources of the State), the ground water involved here is, by fact of nature, part of a hydrologic cycle which, if interrupted, imperils not only the citizens of Nebraska, but the nation as a whole.

In other words, whether minnows, natural gas or waste disposal sites are consumed in one state or another makes no

difference to the nation's resource base.[4] And it is best left to the marketplace to determine the proper allocation among the states. In stark contrast is the disruption of the nation's water resources which occurs when ground water is drawn off in one region to supply the needs of a distant user.

Aquifers recharge. Much of the water pumped out of the ground to irrigate a farmer's land or wash a person's dishes will one day find its way back into the same aquifer to be used again. However, when that water is carried over long distances, across watersheds and into other states, it is removed from the hydrologic cycle, never again to replenish its source. Not only is such water made unavailable for reuse, but the resulting depletion may lead to severe overdraft problems.

Consequently each state has a legitimate interest, indeed, a responsibility, to manage and conserve its water supplies. Nebraska, like other states, does this through its comprehensive system of state water laws.[5] The Nebraska Ground Water Management and Protection Act, Neb. Rev. Stat. § 46-656 *et seq.* (Reissue 1978), provides for the curtailment of ground water withdrawals during times of drought in designated Natural Resource Districts. The Nebraska Ground Water Regulatory Act, Neb. Rev. Stat. § 46-675 *et seq.* (Reissue 1978), requires that any industrial user intending to withdraw more than 3000 acre-feet per year for industrial purposes obtain a permit from the state. Nebraska's Constitution stipulates that the right to divert unappropriated surface water may be denied when not in the public interest. Neb. Const. Art XV, § 6 and its statutory counterpart, Neb. Rev. Stat. § 46-235 (Reissue 1978).

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[4] It was precisely this distinction which this Court drew in *City of Philadelphia.* In distinguishing the constitutionally valid quarantine laws from New Jersey's ban on the import of solid and liquid waste, this Court stated, "There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible." *Id.* at 629. Yet precisely this claim may be made in this case, because ground water taken out of the state is more likely to interrupt the hydrologic cycle than is ground water used within the state.

[5] *See,* Aiken, *Nebraska Ground Water Law and Administration,* 59 Neb. L. Rev. 917, 942-86 (1980).

However, once removed from the state, Nebraska loses both physical and legal control over such water. No action of the State can bring water back into the hydrologic cycle if that water is transported out of the watershed or is permitted under the laws of another state to be applied to a wasteful use.

Because the harm to the state's water resources is heightened when water is transported outside of the state, Nebraska may legitimately impose stricter conservation measures on out-of-state users. Thus, the fact that a state statute is triggered by the transport of the regulated article across a state line does not constitute prohibited discrimination when, as in this case, the trigger is employed not to serve protectionist goals but to address a threat to an ecological system of fundamental importance to the people of the state.

2. The burden imposed by the statute's conservation requirement falls not on commerce generally, but specifically upon those who seek to use ground water in a wasteful manner.

Unlike the Texas statute in *City of Altus v. Carr*, 255 F.Supp. 828 (W.D.Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966), the Nebraska conservation requirement imposes no blanket prohibition on the removal of ground water from the state. The only person affected by Nebraska's conservation requirement is one who seeks to use water in a manner inconsistent with sound conservation practices or contrary to the public interest. Clearly, the interests of such an individual cannot weigh heavily against the interests of the people in properly managing their water resources and protecting their environment.

Thus, whatever merit this Court may find in Appellants' argument that the reasoning in *City of Altus* (striking down an absolute ban on the interstate transport of ground water) should be applied to the reciprocity requirement of the Nebraska statute, that case provides no support for the invalidation of the conservation component of the statute.

Indeed, Appellants appear to concede the constitutionality of the conservation requirement.

> In our view Nebraska could have attained its goals by making the [conservation] determination called for in the statute. The statutory tests are less burdensome than a decision based solely upon reciprocity since reciprocity acts as an absolute bar and the decisions based upon the determinations called for in the statute would be made on a case-by-case basis and would truly reflect the interests of the State of Nebraska.

Brief for the Appellants at 22. Appellants further state, "If the [conservation] evaluation was all that was required for the issuance or denial of a permit, the statute would achieve Nebraska's objectives in a reasonable, logical manner." Brief for the Appellants at 26.

B. The statute is reasonably adapted to achieving a legitimate state purpose, and its local benefits outweigh any incidental burden.

Given that some incidental burden is imposed, the next step in the constitutional analysis is to weigh the local benefits of the statute against that burden. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Legislature of Nebraska has drawn a reasonable line.[6] Caught within its regulatory net and subjected to the ground water management statute's special scrutiny are the users who pose the greatest threat to the resource—those who would remove water from the hydrologic cycle.

The minimal burden imposed on interstate commerce by the conservation requirement pales in the light of the critical

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[6] "When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. [Citing Fourteenth Amendment cases.] This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938) (upholding width and gross weight limits on South Carolina highways).

ground water management problem faced by the Western States. See discussion in Part I of this Argument. Were this Court to strike down this effort by the State to address the urgent need for more careful management of its water resources, the movement toward enlightened reform of state water laws throughout the arid West would be dealt a severe blow.

III. IF THE RECIPROCITY REQUIREMENT IS STRUCK DOWN, THIS CASE SHOULD BE REMANDED FOR A DETERMINATION OF SEVERABILITY.

Nebraska case law recognizes that "[w]here it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the valid parts that they would not have passed without them, the former may be rejected and the latter upheld." *State v. Padley*, 195 Neb. 358, 359, 237 N.W.2d 883, 885 (1976); *see also, Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976); *Linn v. Linn*, 205 Neb. 218, 285 N.W.2d 765 (1980); *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (1968); *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966). Nor is a severability clause in a Nebraska statute a prerequisite to a finding of severability. *Chase v. County of Douglas*, 195 Neb. 838, 852, 241 N.W.2d 334, 342 (1976); *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (1968).

Because Nebraska clearly recognizes the doctrine of severability, if this Court determines that the reciprocity requirement is unconstitutional the case should be remanded for a determination of its severability under Nebraska law.

CONCLUSION

Limitations imposed by Nebraska on the interstate transport of ground water by persons not applying sound conservation practices or otherwise acting contrary to the public interest do not constitute an undue burden on interstate commerce. Rather, these conservation requirements serve a legitimate, nonprotectionist purpose of great importance to Nebraska and the Western States generally. Such benefits far outweigh the burdens placed on those who seek unchecked access to this limited resource. Therefore the Court should uphold the conservation requirement of the statute, and, in the event that the Court invalidates the reciprocity requirement, remand the case for a determination of severability.

Respectfully submitted,

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IN THE

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JOY SPORHASE AND DELMER MOSS
INDIVIDUALLY AND AS REPRESENTATIVES OF
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v.

STATE OF NEBRASKA EX REL.
PAUL L. DOUGLAS, ATTORNEY GENERAL,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF THE STATE OF NEW MEXICO AS *AMICUS CURIAE*

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QUESTION PRESENTED

Do the laws of western states preventing or restricting the extraterritorial use of each state's internal waters violate any constraints imposed by the dormant commerce power contained in Article I, §8, cl. 3 of the United States Constitution?

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No. 81-613

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF THE STATE OF NEW MEXICO AS *AMICUS CURIAE*

The State of New Mexico respectfully submits this brief as *Amicus Curiae* supporting the Appellee, the State of Nebraska. Pursuant to Sup. Ct. R. 36.(4), consent of the parties need not be obtained and therefore has not been sought.

INTEREST OF *AMICUS CURIAE*

At issue in this case is the reciprocity provision of a Nebraska statute governing the extraterritorial use of ground water. In resolving this question, however, the Court must inevitably address the interrelated question of whether states, in exercising the governmental function of planning and providing for the water needs of their people, may prevent or restrict the extraterritorial use of water necessary to maintain their sovereign integrity.

New Mexico is one of the most arid states. Appendix A shows graphically that the states between the 100th meridian to the east and the Pacific coastal states to the west receive comparatively little precipitation. Historically, the need to control scarce water supplies in the arid region states – Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming – has resulted in the development of more state law than any other subject of governmental regulation.

Water is the principal factor limiting the present quality of life and future development in New Mexico. All of the rivers in the state are fully appropriated, and some of the state's ground water supply is currently being mined, *i.e.*, it is being depleted faster than it is being replenished. Growth can take place in New Mexico only through changes in the purpose and place of use of existing water rights.[1] New Mexico's projected water shortage has been estimated to be 1.5 million acre-feet per year by 2020.[2]

Compounding the anticipated deficit in water supply, additional intrastate pressures are being exerted on existing supplies. Unadjudicated federal claims for Indian reservations threaten

1. *See generally*, U.S. Dept. of the Interior, *Westwide Study Report on Critical Water Problems Facing the Eleven Western States*, 335-54 (1975).

2. *See* U.S. Dept. of the Interior, *New Mexico Water Resources Assessment for Planning Purposes* (1971).

to reduce the divertable supply in nearly every stream system in the state. Similarly, non-Indian federal reserved right claims are currently being determined in seven adjudications involving the competitive rights developed under state law of some 20,000 water users. In short, not only is demand exceeding supply in an increasing ratio, but the potential recognition of unadjudicated claims is equally disquieting.

The urgency of New Mexico's interest is demonstrated by the fact that in the arid West demand for water exceeds its supply. New Mexico is especially interested, however, because many of the issues raised in this appeal are present in a suit pending in federal district court in Albuquerque. *City of El Paso et al. v. Reynolds, et al.*, Civil No. 80-730-HB.

El Paso is situated south of the New Mexico-Texas state line, and is across the Rio Grande from Ciudad Juarez in Mexico. Because El Paso's ground water supply in Texas will be mined out by 2050, the city has sought a declaration that all New Mexico laws, including the Rio Grande Compact of 1938, 53 Stat. 785 (1939), which prohibit the export of New Mexico water violate the dormant Commerce Clause. If successful, El Paso would extract 296,000 acre-feet of water per year for use in Texas. Notwithstanding New Mexico's present needs and anticipated shortages, El Paso proposes to take 14 percent of the total depletable supply of the entire state of New Mexico.[3]

3. In its *amicus curiae* brief El Paso described the water it proposes to take as "essentially unused groundwater." It is undisputed, however, that the ground water is hydrologically the same as the surface flows of the Rio Grande, albeit at different points in time. It is also undisputed among hydrologists that depletions of ground water will ultimately be fully reflected in diminished surface flows. Aside from other New Mexico law, the surface flows of the Rio Grande are controlled by two institutions, *i.e.*, the Mexican Convention of 1906, 34 Stat. 2953, and the Rio Grande Compact of 1938. In the case of El Paso's proposed appropriation, subjecting the allocation of water to the marketplace would undermine three tiers of governmental control, viz., New Mexico law, an interstate agreement which is also a federal law, and an international treaty.

El Paso's problem derives in large part from the fact that ground water in Texas in unmanaged. Texas is the only western state which has chosen not to assert a sovereign interest in the ground waters of the state and therefore has never developed state laws or institutions to control the appropriation and use of ground water. Under the law of Texas, ground water is treated in the same manner as any other mineral subject to private ownership. *See Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 (Tex. 1978). A landowner in Texas has a right of absolute ownership regardless of the effect on other wells, neighboring surface rights, or the reasonableness of his use. It is said in Texas that you can steal your neighbor's water, but you can't pollute it.

Because Texas has chosen to treat ground water as a private commodity, it is subject to the constraints of the Commerce Clause. *See City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam* 385 U.S. 35 (1966). Pursuant to congressional direction, however, ground water in New Mexico is quite different. In recognition of the scarcity of water, all water in New Mexico is publicly owned and subject to elaborate governmental controls over the point of diversion, purpose, place, and method of use. A water right in New Mexico is merely a license to use the resource, subject to divestment or forfeiture if misused or not used. All uses of water in New Mexico, whether by individuals or political subdivisions of the state, are public in nature. Even individuals in New Mexico have the right of condemnation in order to construct the diversion and conveyance works necessary to apply the public waters to beneficial use.

New Mexico's interest in this appeal is illustrated by El Paso's attempt to wrest the allocation, conservation, and regulation of water use from governmental control and subject it to an uninhibited interstate marketplace. New Mexico's water needs are real. As more demands are placed on the state's supply, the

state's planning function becomes more significant. To require the export of water needed in New Mexico would have the practical effect of forcing upon New Mexico the antiquated and extravagant water laws of the State of Texas. Because Texans can drain their own aquifers dry is no reason to usurp the public controls established in New Mexico.

In this appeal El Paso has urged that a state's claim of "public ownership" of water is merely a fiction expressive of the state's interest in regulating the resource. In our view, the constitutional propriety of a state statute restricting the export of ground water does not turn on whether the state "owns" its water resources; it turns on whether the state has exercised its police power in conformity with federal law. Public ownership of non-navigable western waters, however, is not a feigned concept. It is a concept which identifies the right of each state to decide how property interests in water can be created, enjoyed, and terminated, to obtain by compact or decree a certain quantum of water for exclusive intrastate use, and to allocate the resource in order to maintain its sovereign integrity. Accordingly, Congress has chosen to relegate water to the dominion and control of a politically constituted authority instead of the marketplace. It is the object of this brief to ensure that this history is not forgotten.

SUMMARY OF ARGUMENT

Water law in the western United States has been characterized by congressional deference to and participation in the creation of systems of water control in which the individual states regulate the appropriation and use of water and Congress protects federal property interests, provides financial assistance for large projects, and resolves jurisdictional impediments to state control.

Most western systems which developed are premised on the requirement of application of water to a beneficial use rather than on ownership of riparian land, which characterizes water rights allocation in the eastern United States. Conflicts between rights established by beneficial use were resolved by the doctrine of prior appropriation which gives the better right to the prior appropriation. The creation of states and territories in the West and the recognition that water control was a paramount local interest led to the states' and territories' assertion of public ownership of water and the establishment of substantive and procedural requirements for acquiring a right to use the public water.

Since the development of these state systems, Congress has acknowledged the rights of the states to control their internal waters. Congress has ensured that state systems are not undermined and has removed financial and jurisdictional impediments to state control. The acts of Congress which incorporate or defer to state control of water resources also demonstrate that Congress does not intend water to be subject to free transactions in a market place. Many acts of Congress have explicitly limited or prohibited such transferability. Congress has the power to restrict commerce and to delegate the authority to regulate commerce to the states. When Congress has determined a balance between the federal and state regulation of commerce, the Court's consideration of dormant Commerce Clause constraints is no longer necessary.

Even if congressional power over interstate commerce had not been exercised to give the states control over their internal waters and the authority to restrict the place of use of that water, the dormant Commerce Clause still should not be applied to water control. The Court has acknowledged that water control is one of the most fundamental interests of the states. The public interest in controlling a resource which is essential to the existence of the state and its citizens exceeds

the proprietary interests that this Court has recognized as enabling a state to prohibit commerce. When it controls water allocation and use in order to provide for present and future needs, a state is exercising an essential governmental function. Market cases involving a private interstate market and products, which are subject to the absolute rule of capture and ownership, are inappropriately applied to a resource which demands the exercise of essential state governmental functions. The Court should not upset the political balance between the states and Congress, and it should not erode one of the most fundamental of state governmental functions.

I. CONGRESS HAS CONSISTENTLY AND REPEATEDLY ACTED TO PROMOTE THE DEVELOPMENT OF PLENARY STATE CONTROL OVER INTERNAL WATERS IN THE WESTERN STATES, THEREBY EXEMPTING THE WATER LAWS OF THE STATES THAT DO EXERCISE CONTROL FROM SCRUTINY UNDER THE DORMANT COMMERCE CLAUSE.

The development of water law systems in the western states illustrates the federal-state governmental relationship that results in functioning federalism. The states, with consistent federal approval and participation, enacted water law systems to conserve, protect and allocate their scarce internal water supplies. These systems recognized that because water is essential to life and each state has unique water needs, the state on behalf of its people, rather than the federal government or individuals acting in a private market setting, should make the difficult and sensitive decisions concerning the control and allocation of water.

For over one hundred years, Congress has fostered and actively participated in the development of a system for the control of western waters. In this system, the states have exercised plenary authority over their internal waters to provide for the water supply needs of their people while Congress

protects federal interests in the waters and water courses,[4] finances, constructs and operates large water projects, and resolves problems which the states cannot resolve among themselves.

The scarcity of water in the West and discontinuities in its distribution compelled the development of a system of water laws that would respond effectively to local exigencies. Consequently, Congress chose to confer water control on the states.

Congressional recognition of the need for local water law systems in the West began with the Mining Act of July 26, 1866, 14 Stat. 251, and the Act of July 9, 1870, 16 Stat. 217. These statutes required water right claimants on federal lands to comply with existing state or territorial water laws.[5] In 1877, Congress passed the Desert Land Act, 19 Stat. 377, which made non-navigable waters on the public domain "subject to the plenary control of the designated states. . ., with the rights in each [state] to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935). *See also Ickes v. Fox*, 300 U.S. 82 (1937). These acts confirmed the western states' plenary control over all nonfederal waters within their boundaries. *See United States v. New Mexico*, 438 U.S. 696 (1978).

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4. The legitimate federal interests which must be protected are the property interests in federal reservations, whether the reservations are for Indian or non-Indian purposes, *see Arizona v. California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 438 U.S. 696 (1978); and the continued navigability of navigable rivers, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

5. Even before 1866 the system of appropriations and control was recognized to have been encouraged by the federal government, and therefore the federal government was obliged to protect it. *Broder v. Water Co.*, 101 U.S. (11 Otto) 274 (1879).

Although Congress debated the issue of state control until the 1890's, the suggestion of federal control was ultimately rejected and state control was never again an issue before Congress. *See* S. Rep. No. 928, 51st Cong., 1st Sess. 12-13 (1890); S. Rep. No. 1466, 51st Cong., 1st Sess. 58 (1890); *Tenth Annual Report, U.S. Geological Survey*, Part II, at 4-8 (1889-90); Act of August 30, 1890, 26 Stat. 391.

In 1902 Congress passed the Reclamation Act, 32 Stat. 389, which facilitated large scale construction projects to reclaim the lands of the arid western states. Although reclamation of arid lands was a national objective which the federal government would finance, the states retained control over the appropriation, use, and distribution of water. *Id.* at §8.[6] This relationship

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6. *See also* H. R. Rep. No. 1468, 57th Cong. 1st Sess. 6-7 (1902); 35 Cong. Rec. 6728 (1902) (remarks of Rep. Burkett); 35 Cong. Rec. 6676, 6679 (1902) (remarks of Rep. Mondell); 35 Cong. Rec. 2222 (1902) (remarks of Sen. Clark):

> It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters in [the states and territories] west of the Mississippi River, it is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.
>
> * * *
>
> To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in everyone of these States and Territories the laws have been passed that most dilgently regard the rights of the settler and of the farmer, and most diligently and intelligently exclude the idea of monopolistic ownership of the public lands or control of the public waters.

has been consistently maintained in all federal reclamation project legislation. *See* U.S. Department of Interior, *Federal Reclamation Laws and Related Laws Annotated* (three volumes) (1972).

Federal flood control projects also embody the principle of state control over water. The legislative history of the Flood Control Act of 1944, 58 Stat. 888, manifests the concern of western representatives that federal assumption of flood control projects would compromise state control of the states' internal waters.[7] The O'Mahoney-Millikin amendment was included to alleviate that concern.

> [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of these water sheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers. . . . Flood Control Act of 1944, 33 U.S.C. §701-1(1970).

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7. *See, e.g.*, 90 Cong. Rec. 4124, 4197 (1944) (remarks of Rep. Whittington); 90 Cong. Rec. 4217 (1944) (remarks of Rep. Hoeven); 90 Cong. Rec. 4139 (1944), where Rep. Troutman stated:

> While we are almost unanimously committed to the virtues of a flood-control program, we should not let it become the instrumentality by which Federal agencies assume control of water rights which properly belong to the State and its citizens. . . . It should not be forgotten that the primary rights in water rests in the States, and while a program of Federal aid in controlling floodwaters is highly desirable, yet it should not form the basis of a usurpation of the rights of the several States.

90 Cong. Rec. 4140, 4141 (1944) (remarks of Rep. Budick); 90 Cong. Rec. 8420, 8485 (1944) (remarks of Sen. O'Mahoney); 90 Cong. Rec. 4197 (1944) (remarks of Rep. Robinson).

The amendment also provides that the federal government must consult with the states concerning the development of use and control of water west of the 98th meridian, 33 U.S.C. §701-1(a) (1976), and protects future state water demands for municipal, stock water, irrigation, mining, or industrial purposes. 33 U.S.C. §701-1(b) (1976).

Congressional recognition of the paramount importance of state water control is also the basis for the McCarran Amendment, 43 U.S.C. §666 (1976), which provides congressional consent to the joinder of the United States as a defendant in the adjudication of water rights in state courts.[8] Adjudication of water rights is necessary to establish the existence, quantification and relative priorities of water rights, and without this determination a state cannot effectively inventory its water resources, it cannot plan for future needs, and it cannot enforce priorities in times of water shortage.

Furthermore, Congress' important role in the establishment of interstate water compacts further underscores the federal deference to state water management. These compacts recognize each state's plenary control over its apportioned waters and reserve the apportioned waters for each state's use within its territory. Article I, Section 10, Cl. 3 of the United States Constitution requires congressional consent for states to enter into interstate compacts. Congress maintains its power over state agreements through the consent process, thereby avoiding state interference with the exercise of federal authority. Needless to say, congressional consent and approval of interstate

8. S. Rep. No. 755, 82nd Cong., 1st Sess. (1951), noted:

> Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years. *Id.* at 6.

compacts carry with them all the legal consequences of any other acts of Congress. *Cuyler v. Adams*, 449 U.S. 433 (1981).

Because interstate compacts are negotiated on the assumption that each state has complete control over its allocated water, most compacts involving western states are administered at the state level and, in many instances, impose limitations on the place where allocated water may be used. *See, e.g.*, Upper Colorado River Basin Compact, Art. II(f) & (g), 63 Stat. 31 (1949).[9] These compacts, which are predicated on state control, incorporate a limitation on place of use because the states have no extra-territorial powers and cannot administer water uses across state lines. *Lindsey v. McClure*, 136 F.2d 55

9. Some compacts provide for "beneficial consumptive use in" each state, Pecos River Compact, 63 Stat. 159 (1949); Republican River Compact, Art. IV, 57 Stat. 86 (1943); *cf.* Arkansas River Basin Compact, (Arkansas and Oklahoma), Art. IV, 87 Stat. 569 (1973). Other compacts allow the states free and unrestricted use of the basin water within their boundaries, Canadian River Compact, 66 Stat. 74 (1952); Arkansas River Basin Compact (Kansas and Oklahoma), Arts. V & VI, 80 Stat. 1409 (1966). Still other compacts limit use of appropriated water to the river basin, Colorado River Compact (approved in the Boulder Canyon Project Act, 45 Stat. 1057, 1064 (1928)); Yellowstone River Compact, Art. X, 63 Stat. 663 (1951); *cf.* Klamath River Compact, 71 Stat. 497 (1957); Snake River Compact, 64 Stat. 49 (1950).

In the Boulder Canyon Project Act, where Congress apportioned the lower Colorado River for use in perpetuity within basins and within states, water was not treated as, nor was it intended to be, an item transferable across basin lines or state boundary lines. There the Secretary of the Interior was given broad powers in distributing the waters and in determining how shortages would be shared, but his functions were premised on the state being the proper unit for water distribution. *Cf. Arizona v. California*, 373 U.S. 546 (1963).

(10th Cir. 1943); *Walbridge v. Robinson*, 125 P. 813 (Idaho 1912).[10]

Finally, Congress has recently decided that free transferability of water would be detrimental to the state interests. The Colorado River Basin Project Act of 1968, 43 U.S.C. §§1501-56 (1976), which "provide[s] a program for the further comprehensive development of the water resources for the Colorado River Basin. . .", prohibits the Secretary of Interior from undertaking any study of water importation into the basin for a period of ten years. 43 U.S.C. §1511 (1976).[11]

The history of federal-state cooperation in the administration of western water law demonstrates that Congress has expressly authorized the states to exclusively control and manage their internal waters.[12] Congress had full authority under the Commerce Clause to confer that power upon the states. *Lewis v. BT*

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10. Only when there is a compelling need for regional control or when the states were unable to agree has Congress intervened. For an example of an interstate compact which vests all planning and water allocation in an interstate commission, *see* Delaware River Basin Compact, 75 Stat. 688 (1961). For an example of congressional intervention that equitably apportioned an interstate river, *see* Boulder Canyon Project Act, 45 Stat. 1057 (1928) and *Arizona v. California*, 373 U.S. 546 (1963).

11. That provision was extended by unanimous vote of Congress for another ten years in 1978. 92 Stat. 2472 (1978). In 1980 the provision was extended to preclude all federal officials from acting because such diversions were said to constitute a threat to the "orderly development of remaining resources" in other basins. 126 Cong. Rec. S12787 (daily ed. Sept. 17, 1980) (remarks of Sen. Church). Act of October 3, 1980, 94 Stat. 1507.

12. The discussion above dealt with only a few of the congressional acts. These acts were chosen because they best illustrate the development and nature of the federal-state relationship created by Congress. For a discussion of how other acts deferred to state law, *see* Hearings on S.1275 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-10 (1964), cited in *United States v. New Mexico*, 438 U.S. 690 (1978).

Investment Managers, Inc., 447 U.S. 27 (1980). "If Congress ordains that the states may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Insurance Co. v. State Board of Equalization*, ____U.S.____, 101 S.Ct. 2070, 2075 (1981). Once Congress confers authority on the states to affect commerce,

> courts are not free to review [resulting state action] under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent states from burdening commerce, and it matters not that the courts would invalidate the [state action] under the Commerce Clause in the absence of congressional action. *Merrion v. Jicarilla Apache Tribe*, 50 U.S.L.W. 4169, 4175 (1982).

All of these federal actions have consistently acknowledged one crucial fact: the state in conjunction with the national government, rather than the private market place, is the primary unit for the management of water. If private market principles became the basis for water allocation and control in the western states, the system that Congress and the western states have fashioned for water management would become totally dysfunctional.

II. THE WESTERN STATES' VITAL GOVERNMENTAL INTEREST IN PROVIDING FOR THE WATER NEEDS OF THEIR PEOPLE IS IMMUNE FROM DORMANT COMMERCE CLAUSE CONSTRAINTS.

Congressional acts have consistently acknowledged that the state, rather than the private market place, is the primary unit for the management of water. When a state asserts plenary control over its internal waters, it acts to protect the public interest in the conservation and management of its scarce water supplies.

As a state develops and more demands are put upon its water supply, the need for conservation and protection of water becomes more acute. Western water law systems, such as New Mexico's, enable most western states to safeguard the public interest by performing the essential governmental functions of water protection and management. If the dormant Commerce Clause were applied to these governmental functions, private market principles rather than the public interest would become the basis for water allocation and control. Private market principles are antithetical to state water law systems which promote conservation. For example, if water users of two states are on opposite sides of a state line and one state follows the rule of "absolute ownership" and the other follows the prior appropriation doctrine, or any other doctrine designed to encourage conservation, the state following prior appropriation would have the strongest incentive to abandon all attempts at control or conservation.

This Court has recognized that the dormant Commerce Clause does not apply to a state's integral governmental functions. This is especially true where the governmental function concerns the state's vital interest in the conservation, management and allocation of its water supplies:

> [I]t appears to [the Court] that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

The importance of preserving state governments which are capable of protecting the interest and providing for the essential

needs of their people is consistent with the current view of the Court:

> Restraint [in applying the dormant Commerce Clause] is also counseled by considerations of state sovereignty, the role of each state 'as guardian and trustee for its people'. . . .
>
> * * *
>
> [The application of the Commerce Clause] would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. . . . A healthy regard for federalism and good government renders us reluctant to risk these results.

Reeves, Inc. v. Stake, 447 U.S. 429, 438, 441 (1980) (citations omitted). *See also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

The water law system in New Mexico, which typifies the response of most western states to inadequate water supplies, illustrates that providing for present and future water needs involves vital interests of the state and constitutes a fundamental governmental function. New Mexico began to exercise this governmental function when it "nationalized" its limited water supplies "[n]ot as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control." *Threlkeld v. Third Judicial District Court*, 36 N.M. 350, 355, 15 P.2d 671, 673 (1932). The distinction in *Threlkeld* between water and privately owned minerals and other resources is "too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival." *Kaiser Steel Corp. v. W. S. Ranch Co.*, 81 N.M. 414, 417, 467 P.2d 986, 989 (1970).

New Mexico law and the law of most western states recognize the scarcity of water supply. Through its constitutional declaration of public ownership and extensive statutory control over appropriation and use, New Mexico distinguishes water from minerals and other resources. *See* N.M. Const. Art. XVI, §§2 and 3; §§72-1-1 *et seq.*, N.M.S.A. 1978. New Mexico's assertion of public ownership of water resulted from the state's need to maximize the beneficial use of its limited water supply through centralized administration and management. Under New Mexico's system the state does not sell unappropriated water in a market place, and water is not subject to private ownership. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981). Instead, the state retains title to the water as trustee for its people. *See State v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950), *appeal dismissed*, 341 U.S. 924 (1951).

In acting as trustee of the public waters, New Mexico and other western states provide for the water supply needs of their people by determining the criteria for distribution of water rights, the conditions and limitations imposed on such rights, and the benefits to be derived through the exercise of such rights. These decisions determine the structure and viability of political, social and economic development within the state.

The interests of the western states in managing, protecting and allocating their water supplies are more essential for the preservation of the integrity of state sovereignty than the other state governmental interests and functions which have been exempted by this Court from dormant Commerce Clause constraints. It is apparent that the states' interest in providing water is more fundamental than South Dakota's economic interest in *Reeves* in providing cement products to its people and Maryland's environmental interest in *Alexandria Scrap* in removing automobile hulks from its highways.

The arguments of Appellants and El Paso are premised on cases which involve private markets and privately owned

resources, including *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); and *City of Altus v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966). A brief analysis of these private market cases demonstrates their inapplicability to the western states' management, protection and allocation of their publicly owned water supplies.

The private market cases have three essential elements: (1) they involve the sale of a commodity which is privately owned; (2) there is an existing private interstate market for that commodity; and (3) the sole purpose of the state legislation was to protect in-state private business, private markets and private interests. The water law systems of most western states are distinguishable from the private market cases on the following bases: (1) they treat water as a public asset which must be used for the benefit of the people of the state; (2) there is no existing private interstate market for water, except for Texas ground water, and the place of water use within the state is limited by physical availability and administrative restrictions; and (3) the purpose of state water legislation is to protect existing water rights and to provide for the future needs of a state.

In *West* there was a private interstate market and the commodity, natural gas, was subject to absolute private ownership. Furthermore, the supply of natural gas within the state was more than adequate to supply the future needs of the people of Oklahoma. The Oklahoma legislation was not intended to protect an existing need of its people but was merely parochial.

Pennsylvania v. West Virginia is a logical extension of *West*. There was an existing private interstate market and the commodity, natural gas, was subject to private ownership. Pennsylvania and Ohio buyers had purchased West Virginia natural gas

in the interstate market for a number of years before the restrictive legislation was enacted.

Similarly, in *City of Philadelphia* the existence of a private interstate market was clear. For a number of years out-of-state interests used the private landfill areas of New Jersey, while New Jersey residents used private landfill areas within other states. The New Jersey statute, which limited the use of private landfill areas in the state, resulted in the enactment of a retaliatory statute in Pennsylvania. There is no doubt that the case involved a private business activity, a commodity subject to private ownership and parochial legislation.

Hughes concerned a privately owned commodity, natural and hatchery minnows, which were sold in an interstate market. The only purpose of the Oklahoma statute was to limit the number of natural minnows that could be removed from the state and, therefore, it merely provided a competitive advantage to in-state business interests.

Altus is a logical extension of *West* and *Pennsylvania*. Under Texas law, ground water is a privately owned resource, which is subject to capture and sale in the private market place. Texas does not regulate or otherwise control the use of ground water. In fact, Texas is the only western state that chose to follow the English rule of absolute ownership that originated with *Acton v. Blundell*, 12 M. and W. 325, 152 Eng. Rep. 1223 (Ex. 1843). That rule allows a landowner to remove or capture all of the waters that can be pumped from a well on his land, irrespective of the adverse affects such pumping would have on the water rights of adjoining landowners or water rights in hydrologically connected surface streams.

In *Altus*, an Oklahoma city contracted to purchase ground water from a private seller (landowner) in Texas. Relying on a Texas Attorney General's opinion that affirmed that a right to Texas ground water can be acquired by purchase from the owner

of the overlying land, the city issued bonds to purchase the water right and to pay the costs of developing the wellfield.

Subsequent to the transaction, Texas enacted legislation prohibiting the city's export of ground water, except with its permission. The federal district court struck down the Texas statute explaining that the private ownership of ground water compelled its decision:

> Under the law of the State of Texas, a landowner has the right to drill wells and appropriate all the underground percolating waters found to his own purposes, and if, in the exercise of such right, he intercepts or drains off water from beneath his neighbor's land, this inconvenience to his neighbor. . . cannot be the ground of an action. . . .Further, after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off the land and outside the basin where produced, just as he could sell any other species of property. *Altus*, 255 F.Supp. at 840.[13]

Rather than treating water as a privately owned commodity, most western states have chosen to protect and manage their internal waters through water law systems. These systems have been fostered by Congress and have functioned successfully for many years. If they are to be altered, Congress, rather than this Court, should initiate the changes. This Court has consistently recognized that the dormant Commerce Clause is unsuited to a judicial balancing between a state's interest in providing for the needs of present and future generations of its citizens and the present economic interest of out-of-state business. In *Reeves*, the Court noted that "competing considerations in cases

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13. *See Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21 26 (Tex. 1978), where the Texas Supreme Court expressed its view that the holding in *Altus* is based on the fact that Texas follows the doctrine of "absolute ownership" of water.

involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis" and found that "*Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." 447 U.S. at 439. Similarly, this Court refused to balance Montana's interest in its environment, as reflected by its severance tax, against out-of-state demand for coal. The Court was not convinced "that the Commerce Clause of its own force" required this kind of balancing. *Commonwealth Edison Co. v. Montana*, ____U.S.____, 101 S.Ct. 2946, 2955 (1981).

CONCLUSION

The decision of the Nebraska Supreme Court should be affirmed for two reasons. First, Congress has consistently and repeatedly delegated to the western states the responsibility for controlling water allocation and use. Therefore, Congress has precluded the application of dormant Commerce Clause constraints to the water law systems of those states that have chosen to assume that responsibility.

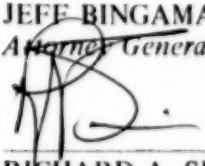
Second, most western states have met the responsibility inherent in this delegation by developing systems to conserve, manage and distribute waters. These states have spent millions of dollars in establishing and funding state agencies which have the requisite hydrologic expertise and proximity to the water systems to guarantee efficient distribution and use of water. Even if Congress had not explicitly delegated powers to control water distribution and use, those fundamental governmental functions are not subject to dormant Commerce Clause analysis, which is applied where states impose parochial limitations on private market transactions involving privately owned goods.

Subjecting the western states' water administrative systems to dormant Commerce Clause analysis would decrease the ability

of a state to meet the basic needs of its citizens and would leave an intolerable gap in federal legislation. If such a change is to be made, it must be accomplished through congressional action, which is coordinated with or replaces the institutional arrangement and principles of state water law systems. The State of New Mexico, as *amicus curiae*, urges therefore that the decision of the Nebraska Supreme Court be affirmed.

Respectfully submitted,

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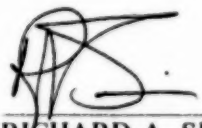
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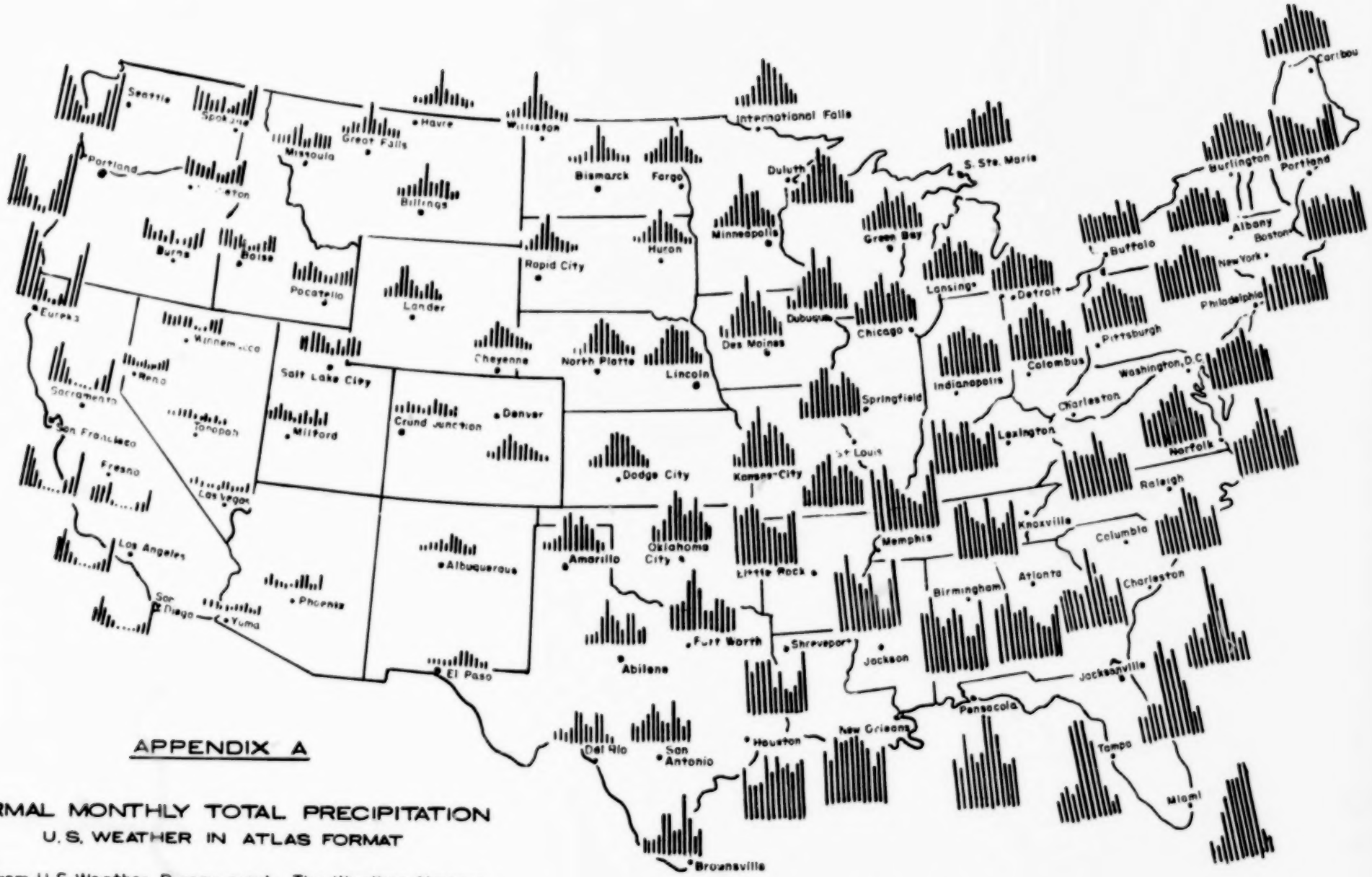
Attorneys for State of New Mexico

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that on the 12th day of February 1982, I served the requisite number of copies of the foregoing Brief on *Amicus Curiae*, by first class mail on counsel of record: for Appellants, Richard A. Dudden, Padley & Dudden, P.C., 333 East Second St., P. O. Box 60, Ogallala, Nebraska 69153, and for Appellees, Paul L. Douglas, Attorney General, Department of Justice, 2115 State Capitol, Lincoln, Nebraska 68509.



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APPENDIX A

NORMAL MONTHLY TOTAL PRECIPITATION

U. S. WEATHER IN ATLAS FORMAT

Data from U. S. Weather Bureau graph, The Weather Almanac, edited by James A. Ruffner and Frank E. Bair.